ORDER PREPARED BY THE COURT

RICHARD DALRYMPLE, MANUEL ESCALEIRA, and NEW JERSEY HIGHLANDS COALITION,, Plaintiffs, vs. HARMONY TOWNSHIP LAND USE BOARD and HARMONY PLAINS SOLAR I, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: WARREN COUNTY DOCKET NO. WRN-L-00148-21 Civil Action **ORDER**

This matter having been opened to the Court upon the filing of a Prerogative Writ action in the within matter, and the Court having tried the matter by receiving and considering the record of the proceeding below as well as other points of the record that were referenced in the Court's opinion; and the Court having considered the Briefs and supporting documents filed on behalf of the parties; and the court having considered argument offered on behalf of the parties, Jeffrey I. Baron, Esq. of Baron & Brennan, P.A., Attorney for Plaintiffs, Richard Dalrymple, Manuel Escaleria and New Jersey Highlands Coalition; Matthew C. Moench, Esq. of King, Moench, Hirniak, Mehta & Collis, LLP, Attorney for Defendant, Harmony Township Land Use Board; and Jennifer M. Porter, Esq., David M. Dugan, Esq., Aileen Brennan, Esq., Lauren R. Tardanico, Esq. and Michael Cross, Esq. of Chiesa, Shahinian, Giantomasi, P.C., Attorneys for Defendant, Harmony Plains Solar I, LLC; and for the reasons set forth in the written opinion of the Court dated March 9, 2022, and for good cause shown;

It is on this 9th day of March , 2022

ORDERED that for the reasons set forth in the Court's decision attached hereto and made a part hereof, the Court affirms many of the Board's actions, but the Court remands the matter to the Board for the limited basis that are described in the Court's opinion; and it is further

ORDERED that a copy of the within Order which has been prepared by the Court shall be provided to counsel for all parties of record.

/S/ THOMAS C. MILLER, A.J.S.C.,Ret. on Recall

Thomas C. Miller, A.J.S.C.,
Ret. On Recall

SEE ATTACHED OPINION OF THE COURT DATED MARCH 9, 2022

Dalrymple v. Harmony Township Land Use Board, et al
Docket No. WRN-L-148-21

I. PARTIES AND COUNSEL

Plaintiffs, Richard Dalrymple, Manuel Escaleria and New Jersey Highlands Coalition ("Plaintiffs") are represented by Jeffrey I. Baron, Esq. of Baron & Brennan, P.A.

Defendant, Harmony Township Land Use Board ("Harmony" or "Defendant Township") is represented by Matthew C. Moench, Esq. of King, Moench, Hirniak, Mehta & Collis, LLP.

Defendant, Harmony Plains Solar I, LLC ("HPS" or "Defendant Solar" or "Harmony Plains" or "HPS") is represented by Jennifer M. Porter, Esq., David M. Dugan, Esq., Aileen Brennan, Esq., Lauren R. Tardanico, Esq. and Michael Cross, Esq. of Chiesa, Shahinian, Giantomasi, P.C.

II. SUMMARY OF PLAINTIFFS' POSITION

Plaintiffs Richard Dalrymple, Manuel Escaleria and New Jersey Highlands Coalition ("NJHC") commenced this action in lieu of prerogative writs to challenge defendant Harmony Township Land Use Board's ("Board") approval of defendant Harmony Plains Solar I, LLC's ("HPS") development application. This approval authorizes the construction of what Plaintiffs describe as a utility-scale solar energy facility on an assemblage of actively-farmed properties comprising approximately 600 acres in Harmony Township.

At the outset, the Plaintiffs proffer that no matter how beneficial a municipality may perceive a particular project to be, that cannot serve as a basis to excuse compliance with the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. ("MLUL") or local development regulations in the absence of appropriately-granted relief. Plaintiff advocates that is precisely what occurred in this case. HPS's development proposal required multiple "d" variances. But Plaintiffs submit that the Board disregarded the need for such relief, however, and, as such, the required "d" variances were "never obtained or proved." Moreover, although HPS requested and the Board granted multiple "c" variances, the proofs adduced by HPS did not justify the proposed nonconforming conditions. Plaintiffs also contend that both HPS's application and the Board's hearing thereon were "marred by a series of fatal procedural miscues", including HPS's deficient pre-hearing notice, a lack of required disclosure by HPS's individual shareholders, participation and voting by an ineligible Board member and the Board's adoption of a memorializing resolution which lacked basic findings of fact and conclusions of law.

Plaintiffs offer that perhaps the most significant infirmity in this case, however, involves the participation of Board members with disqualifying conflicts of interest. Amongst HPS's assemblage of properties proposed for development included a 180+ acre parcel owned by Harmony Township. In fact, the hearing conducted by the Board on HPS's application was the culmination of many months of work between HPS and the municipality.

Plaintiffs allege that approximately a year and a half prior to the hearing, Harmony Township, "led by Mayor Brian Tipton", negotiated and executed a lucrative Lease Option Agreement with HPS providing for annual payments of $50,000.00 to the municipality. Plaintiffs state that in exchange for these sums, the Lease Option Agreement grants HPS an exclusive option to lease the 180+ acre parcel from Harmony Township in accordance with the terms of a 30-year Solar Land Lease Agreement which, if exercised, provides for annual payments of $350,000.00 to Harmony Township.

Plaintiffs postulate that the land development approvals are the key to HPS's exercise of the Solar Land Lease Agreement and, therefore, the substantial cash influx to Harmony Township. Plaintiffs note that without the approvals, HPS will not and could not proceed. Plaintiffs argue, therefore, that "It is little wonder then that Mayor Tipton and the Board gave only superficial treatment to HPS's application." In this regard, Plaintiffs state that Mayor Tipton disappeared from the virtual hearing for extended periods of time, but even when he was on screen, however, "he paid minimal attention and opted instead to conduct physical exercises, such as sit-ups, in plain view of the public."

Plaintiffs indicate that the mere fact that Mayor Tipton participated and voted on HPS's application should be considered to be fatal to the proceedings. According to the Plaintiffs, both he and Committeeman Richard Cornely possessed unwaivable conflicts of interest under New Jersey statutory and decisional law. Plaintiffs posit that as compensated employees of Harmony Township, they were absolutely precluded from participating and voting on an application which stands to directly benefit their employer as well as benefit them personally in any bid for re-election. For all of those reasons, Plaintiffs submit that the Court should invalidate and set aside the Board's action, as a matter of law.

III. HARMONY TOWNSHIP LAND USE'S POSITION SUMMARIZED

Harmony offers that this case involves a "hapless prerogative writ challenge" that raises numerous "baseless" procedural and substantive arguments in an attempt to reverse Defendant Harmony Township

Land Use Board's (the "Board's") valid land use approval (the "Approval") for Defendant Harmony Plains Solar I, LLC ("Applicant" or "HPS") to construct a solar production system involving a significant capital investment within the municipality. Harmony contends that Plaintiffs' arguments should be rejected and the land use approval should be affirmed in toto. First, Harmony states that Plaintiffs "incorrectly" contend that the Class I and Class III members, who are also required to serve on the governing body, were conflicted because a subset of the properties comprising the application were subject to an option agreement with the municipality. Harmony asserts that this argument is inconsistent with the common law, which only finds incompatible dual offices in the absence of statutory authority establishing the two positions, as embodied in the MLUL. Plaintiffs also fail to establish any conflict under the Local Government Ethics Law as a matter of law.

Second, Harmony notes that Plaintiffs raise procedural claims about certain planning board members participating on Zoom for periods without their cameras on. However, the Legislature specifically adopted a law that immunizes land use approvals from challenges on such procedural grounds during the COVID-19 pandemic. Harmony also points out that even if this argument is considered on the merits, Plaintiffs obtained responses to interrogatories that confirmed that no voting member ever disconnected from the subject hearing. Yet Plaintiffs' argument simply ignores those undisputed facts.

Third, Harmony asserts that the Plaintiffs incorrectly contend that the Applicant's public notice was insufficient. The notice properly described the application for a "solar production system," which is a term that both can be understood by a layman and is contained in Harmony's Zoning Ordinances. Accordingly, Harmony asserts that the notice was sufficient under the MLUL.

Fourth, Harmony advocates that the Plaintiffs raise an "invalid argument" challenging the memorializing resolution. This document was eight pages in length and specifically included the findings of fact and conclusions of law required by the MLUL.

Fifth, Harmony contends that the Plaintiffs "falsely" claim that the Board improperly granted two (c) variances. The Board validly provided relief from setback and impervious coverage requirements to approve a subdivision allowing for the preservation of an historic farm home, and Plaintiffs fail to meet their burden to disturb this determination.

Sixth, Harmony asserts that the Plaintiffs "incorrectly claim" that the Applicant was required to obtain a (d)(1) use variance for the electrical substation within the proposed solar

production system. Harmony posits that this argument presents an unreasonable interpretation of Harmony's conditional use ordinance permitting "solar production systems," which is clearly meant to include electrical substations as part of the "system" that is permitted.

Seventh, Harmony urges that the Plaintiffs "incorrectly claim" that the Applicant was required to obtain (d)(3) conditional use variances from various provisions of the solar production system conditional use ordinance. According to Harmony, this argument should be rejected, as the record contains sufficient proofs that the applicant satisfied each of the standards that Plaintiff places at issue, and Plaintiff cannot meet its burden to disturb the Board's findings.

Eighth, Harmony indicates that the Plaintiffs claim that the Applicant's ownership disclosure statements were invalid. In the event of any error, the Board contends it should not be fatal, as case law establishes. The Board notes a revised ownership disclosure statement has now been provided by the applicant, as well as certifications provided by the Board in furtherance of same. Harmony contends that this Court should affirm the resolution based upon crediting these submissions. In the alternative, Harmony asserts that if this approach is not adopted, the Board alternatively supports a limited remand to address the ownership disclosure issue.

IV. HARMONY PLAINS POSITION SUMMARIZED

Harmony Plains indicates that each of Plaintiffs' numerous "strained arguments" contesting the approval by Harmony Township's (the "Township") Land Use Board (the "Board") of Harmony Plains Solar I, LLC's ("HPS") application to develop a solar production system (the "Application") fails, in some instances for multiple reasons. To summarize: (1) the Mayor and Councilman had no conflict of interest precluding them from voting on the Application; (2) the pre-meeting notice of the Board's hearing on the Application was not in any way deficient; (3) the corporate disclosure statute does not apply to limited liability companies and, in any event, the Board members would have had no conceivable conflict with any individual or entity in the ownership chain of HPS as of January 6, 2021; (4) the resolution approving the Application was entirely proper on its face; (5) the Mayor's turning his camera off in no way impacts the validity of the hearing or approval of the Application; (6) no D variance was required contrary to Plaintiffs' mistaken contention, and in any event the record contained more than sufficient evidence to grant HPS a D variance; and (7) the Board's grant of bulk variance relief was amply supported.

Harmony Plains notes that Plaintiffs "lead off" with a "convoluted conflict of interest" argument that two members of the Board somehow could not vote on HPS's Application

because they also served as the Township's Mayor and Councilman. The purported "conflict" arose out of the Township's financial benefit from a lease agreement, entered into after completion of the public bidding process and without any objection, that is part of the approved project at issue (the "Project") and the fact that the Project also might help the Mayor and Councilman politically for having approved it – plus, it may somehow impact their modest stipends of $5,300 and $5,100 per year, respectively. According to Harmony Plains, Plaintiffs' argument not only lacks facial plausibility; it is directly contrary to the MLUL, which provides for the composition of a Municipal Planning Board and requires that both the mayor and a member of the governing body be voting members of the Planning Board.[1] Harmony Plains also note that Plaintiffs do not provide any legal support for their leading point, and the Appellate Division has outright rejected similar arguments.

Harmony Plains also submits that the Township's pre-meeting notice concerning the Application was more than sufficient to fairly apprise the public of the time, place and subject matter of the approval HPS was seeking so they could determine whether they should participate in the hearing or at least look more closely at the plans and other documents on file. The notice here made evident that HPS was seeking approval to develop a solar production system, which the notice described as impacting a total of ***nine specifically identified lots*** spanning over ***three zoning districts*** (in addition to an overlay zone) in the Township. In fact, members of the public appeared and commented at the meeting, prior to which the plans and hearing exhibits were also fully available on-line.

Harmony also offers that Plaintiffs' corporate disclosure argument is "even more tenuous." First, the statute they rely on does not even apply to limited liability companies such as HPS. Even if it did, the Board members have certified that no conflict exists with the sole entity Plaintiffs place at issue – a limited partnership that was, on the relevant date the Application was approved, part-owner of HPS and has numerous layers of owners wholly unknown and unfamiliar to the Board members who voted in favor of the Application.

Also, Harmony Plains contends that contrary to Plaintiffs' "strained argument," the Board's resolution approving the Application (with conditions) is more than adequate. There are

[1] N.J.S.A. 40:55D-23.

seven pages of detailed findings concerning the testimony by HPS's representatives, HPS's experts and the Board's expert, and satisfaction of the relevant standards – all based on a thorough record below of the several-hour hearing.

Also, they indicate that the Plaintiffs' argument that the Mayor turned his camera off during portions of the Zoom meeting and that his action warrants the severe consequence of reversal is entirely unsupported. The State Legislature passed a law in September 2021 that plainly allows meetings to take place by any means of communication, including by telephone, where of course there is no video. Nowhere does that law (or any other law) require that the Board members turn their cameras on. Neither do the Department of Community Affairs' detailed regulations concerning remote/virtual planning board meetings. If the legislature or DCA wanted to impose such requirements, they had every opportunity to do so. Their apparent choice not to do so disposes of the issue.

Harmony Plains also argues that the Plaintiffs' arguments that HPS failed to adduce the proofs necessary for "D" variance relief when no "D" variances were required are also meritless. According to Harmony Plains, a separate D(1) use variance is not required for an electrical substation because it is a critical component of the solar production system use as evidenced by the plain language and intent of numerous provisions in the Harmony Code governing solar production system uses and the clear intended utility-scale solar production system described at great length in the submission documents and during the hearing. Nor was D(3) conditional use variance relief required here because the record clearly established that the conditional use criteria for the proposed solar production system were met as shown by the site plans, exhaustive reports and testimony by the Board Engineer and HPS on the only two conditional use criteria that were even in question. Harmony Plains avers that the Board clearly and concisely reviewed the conditional use criteria governing setbacks and lot area and rendered a reasonable interpretation of the plain language in the Zoning Ordinance after it was established that all other conditional use criteria was satisfied.

Finally, Harmony Plains offers that the Plaintiffs' argument that HPS failed to adduce the proofs necessary for the required "C" variance relief is "entirely lacking in any legal justification." According to Harmony Plains, HPS's planner not only detailed the engineering foundation for the two "C" bulk variances being sought, but clearly articulated the applicable legal criteria for granting a C(1) setback variance and a C(2) impervious coverage variance and the justification for same.

Harmony Plains therefore submits that, in the end, the Board's decisions on whether to approve the Application are accorded great deference and can fail here only if the Board's decisions are arbitrary, capricious and unreasonable. However, they proffer that the record clearly shows that HPS took great care in preparing and presenting its Application and the Board carefully listened to the testimony of HPS with input from its expert consultants and made a well-reasoned decision on the totality of the evidence before it. As such, they note that the Plaintiffs' dissatisfaction with the outcome of the hearing does not make it any less reasonable.

V. PROCEDURAL HISTORY PROVIDED BY PLAINTIFFS

On April 20, 2021, plaintiffs filed a Complaint in Lieu of Prerogative Writs against the Board and HPS which was assigned Docket No. L-148-21. The Complaint included eight (8) separate counts challenging the validity of approvals granted by the Board to HPS as memorialized by the Resolution. The parties subsequently entered into a Stipulation whereby the time for the Board and HPS to file an Answer or otherwise move as to issues of standing or jurisdiction was extended to June 10, 2021. On the last day of the extended period, both the Board and HPS filed Motions to Dismiss that contested plaintiffs' standing to maintain the litigation. Plaintiffs filed opposition and the Court conducted argument on July 28, 2021. The Court denied both motions and entered Orders accompanied by Statements of Reasons on July 29, 2021.

The Court conducted a case management conference on August 4, 2021 and entered a Case Management Order the following day. Both the Board and HPS then filed their respective Answers on August 12, 2021. The parties subsequently exchanged limited discovery.

The briefing schedule outlined in the Case Management Order requires the submission of plaintiffs' trial brief by November 11, 2021, the submission of defendants' trial brief by December 13, 2021 and the submission of plaintiffs' reply brief by December 28, 2021. The Court also scheduled an additional case management conference for December 1, 2021 at which time it will address any outstanding issues and schedule the matter for trial. Subsequently, the briefing schedule was adjusted so that the following briefs were received and considered by the Court:

1. Plaintiff's Brief dated November 11, 2021
2. HPS's Brief dated December 23, 2021
3. Harmony's Brief dated December 23, 2021

4. Plaintiff's Reply Brief dated January 7, 2022

VI. PLAINTIFFS' VERSION OF THE STATEMENT OF FACTS[2]

On or about September 16, 2019, Harmony Township and HPS entered into Lease Option Agreement. (P-1). In exchange for annual payments of $50,000, the Lease Option Agreement granted HPS the exclusive option to lease the 180+ acre property owned by Harmony Township designated as Block 37, Lot 4 on the Harmony Township Tax Map in accordance with the terms of a 30-year Solar Land Lease Agreement. (P-2). If exercised, the Solar Land Lease Agreement provides for annual rental payments of $350,000.00 from HPS to Harmony Township. To date, HPS has paid $112,500.00 to maintain this option. (P-3).

A little more than a year after the Lease Option Agreement's execution, in or about October 2020, HPS submitted an application to the Board for preliminary and final major site plan approval, minor subdivision approval, variances and waivers in furtherance of the proposed development of a utility-scale solar energy facility on an assemblage of properties comprising approximately 600 acres and traversing multiple zoning districts in Harmony Township. (P-4). As depicted on the accompanying plan set (P-5), the specific properties included:

- Block 37, Lot 4 – owned by Harmony Township, comprising approximately 183 acres, and situated in Harmony Township's AR-250 Zoning District and HD/AH High Density Affordable Housing overlay zone;
- Block 38, Lots 2, 2.05 and 2.06 – owned by Roy and Brenda Garrison, comprising approximately 130 acres and situated in Harmony Township's AR-250 Zoning District;
- Block 44, Lots 9 and 10 – owned by 166 Brainards Road, LLC, comprising approximately 165 acres and respectively situated in Harmony Township's LI-O Zoning District and AR-250 Zoning District;
- Block 44, Lot 14 – owned by 715 Harmony Station, LLC, comprising approximately 104 acres and situated in Harmony Township's AR-250 Zoning District;
- Block 44, Lot 23 – owned by R Habitats, LLC, comprising approximately 18 acres and situated in Harmony Township's LI-O and I-1 Zoning Districts.

HPS's submission included a disclosure explaining that it is comprised of five entities and individuals having more than a 10% interest including Dakota Renewable Energy, LLC,

[2] The Court has included Plaintiffs' version of the facts virtually verbatim from their brief for completeness of the record. While Plaintiffs' version does mix argument with its version, its depiction of the factual record is generally accurate.

Dakota Power Partners, LLC, Timothy Daniels, John Schoenberger and MAP RE 2018, LP. (P-6). Contrary to the MLUL's requirements, however, and as more fully explained infra, HPS failed to further disclose the individual ownership interests of Dakota Renewable Energy, LLC, Dakota Power Partners, LLC or MAP RE 2018, LP.

The Board initially scheduled the hearing on HPS's application for December 2, 2020 but it was subsequently postponed to January 6, 2021. In advance of the hearing, HPS caused notice to be published in the newspaper as well as served on the owners of the properties within 200-feet of the subject properties. (P-7) The notice advised that HPS sought approval for a "solar production system" but included no explanation or description of a "solar production system" and contained no other information revealing the massive scale of the proposed facility.

The hearing on HPS's application occurred on January 6, 2021 via the Zoom videoconferencing application.[3] (P-8) As a preliminary matter, the Board sought to determine whether the development proposal satisfied the conditional use criteria for solar production systems set forth in Section 165-45.1 of the Harmony Township Zoning Ordinance ("Zoning Ordinance") (P-9) and, therefore, whether HPS's development proposal required relief pursuant to N.J.S.A. 40:55D-70.d. (T, 14:13 – 21) The Board and its professional consultant Stanley J. Schrek, PE, AIA, PP, CME, LEED AP, engaged in a colloquy with HPS's professional consultant Christopher Nusser, PE, PP, which focused on the bulk and use requirements established by Zoning Ordinance Section 165-45.1(D). (T, 19:18 – 39:17) Despite an assessment in Mr. Schrek's January 4, 2021 technical review letter that concluded to the contrary (P-10), the Board found that HPS's proposal satisfied Zoning Ordinance Section 165-45.1(D)(5) which prohibits more than 80% of a lot from being devoted to a ground-mounted solar production system. (T, 19:18 – 39:17) The Board also determined that HPS's proposal satisfied Zoning Ordinance Section 165-45.1(D)(6) which requires, inter alia, all ground-mounted solar production systems to be set back a distance of 75 feet from all property lines. Id. Ultimately, the Board adjudged that HPS's development proposal satisfied all of the criteria established by Zoning Ordinance Section 165-45.1(D), but Plaintiffs charge that it never engaged in any analysis to determine if HPS's development proposal satisfied the other conditional use criteria

[3] A transcript of the hearing was previously filed with the Court. All references to the transcript herein shall include the identifying designation "T". The video of the Zoom hearing is submitted herewith as P-8.

established by Zoning Ordinance Section 165-1.45.1 or the more general conditional use standards set forth in Zoning Ordinance Article VIII. Id.

Notwithstanding the Board's determination that HPS's development proposal satisfied the applicable conditional use criteria, HPS's counsel suggested that HPS would proffer the necessary proofs as if the application necessitated "d" variance relief. (T, 40:12 – 41:6) HPS's counsel provided the Board with an overview of the development proposal and noted that it comprised multiple properties in multiple zoning districts. (T, 43:11 – 44:24) Timothy Daniels was the first witness introduced by HPS's counsel to testify. (T, 48:7 – 20)

Mr. Daniels identified himself as a co-founder and partner in Dakota Power Partners. (T, 48:23 – 49:4) He explained the project and the various considerations for the particular location. (T, 52:21 – 70:20) He detailed the size of the proposed facility, its projected power-generation capability, the proposed interconnection with an existing JCP&L line, the anticipated life span of the project and HPS's expected monetary outlay. Id. Mr. Daniels suggested that the project aligned with the goals and objectives of the New Jersey Energy Master Plan. Id. He claimed that the use minimally impacted the surrounding neighborhood and would bestow various economic benefits upon Harmony Township. Id.

Chris Nusser, PE, was the next witness proffered by HPS's counsel to testify. (T, 72:5 – 7). Mr. Nusser referenced exhibits which included plans of the eastern and western areas of the project site as well as visual simulations depicting various hypothetical perspectives of the project. (T, 72:8 – 73:5) He reviewed the existing land uses as well as the conditions of the various properties that comprised the project. (T, 73:16 – 78:8)

Mr. Nusser explained that HPS sought to subdivide Block 38, Lot 2 in order to segregate the existing residential dwelling and other farm-related structures from the remainder of the proposed solar production system on that property. (T, 78:15 – 24) He contended that proposed Lot 2.07 complied with the applicable zoning standards with the exception of the front yard setback and the impervious coverage. (T, 79:6 – 17) He posited that the nonconforming front yard setback was an existing condition and within the contemplation of N.J.S.A. 40:55D-70.c(1). (T, 79:25 – 80:2) He further urged that the excessive impervious coverage was justified because it promoted a desirable visual environment and therefore satisfied the positive criteria attendant to N.J.S.A. 40:55D-70.c(2). (T, 80:9 – 18) He then offered the conclusory opinion that no negative impact would result from the grant of the variances. (T, 80:19 – 25) Mr. Nusser never addressed the impact of the variances on the zone plan and Zoning Ordinance.

After reviewing the subdivision component of the application, Mr. Nusser subsequently reviewed HPS's site plan with the Board. He indicated that the solar arrays would be setback 75-feet from the property boundaries and explained the proposed fencing and roads which would be created to facilitate access throughout the project site. (T, 84:4 – 88:14) Mr. Nusser noted that all of the electric lines would be underground, with the exception of the lines running from the substation in the southeastern area of the east parcel that would connect into JCP&L lines. (T, 89:4 – 11) He explained that grading would need to occur in order to accommodate the solar production system and also that HPS required relief in respect of the proposed internal road/driveway grades. (T, 90:24 – 92:20) Mr. Nusser also discussed the feasibility of turnaround movements within the proposed 16-foot internal roads/driveways and suggested that temporary laydown areas could be established during construction. (T, 93:4 – 95:10) He did not, however, address emergency vehicle ingress and egress under operational conditions.

Mr. Nusser described two stormwater basins which HPS proposed to construct in proximity to the substation as well as ground cover which HPS sought to install throughout the site. (T, 95:17 – 98:16) He detailed the proposed landscape buffering which he noted would include five different "modules" of varying intensity and would be sited dependent upon the location. (T, 102:12 – 106:4) He also showed photo-simulations of different proposed buffer conditions at various locations adjacent to the proposed project. (T, 110:11 – 113:10)

Mr. Nusser opined that HPS's development proposal satisfied the conditional use criteria for solar production systems. (T, 113:22 – 118:25) He additionally argued that, although not required, HPS's development proposal nevertheless warranted "d" variance relief because the proposed solar production system constituted an inherently beneficial use. (T, 125:10 – 17) Mr. Nusser further suggested that the Sica balancing test applied and that the proofs militated in favor of the grant of relief. (T, 125:19 – 128:24) He also summarized his prior testimony in respect of the requested "c" variances. (T, 128:25 – 129:13) He did not, however, address the proofs required for a conditional use variance pursuant to N.J.S.A. 40:55D-70.d(3).

A discussion ensued regarding the comments raised in Mr. Schrek's January 4, 2021 technical review letter. (T, 131:2 – 137:4) Mr. Nusser agreed that HPS would comply with some items whereas with others he agreed that HPS would work with Mr. Schrek if and when the application was approved. Id.

After HPS concluded its presentation the hearing was opened to the public. (T, 137:10 – 16) A number of residents voiced opposition to the application, including:

- Katie Higgins – 680 Harmony Station Road, explained that she had concerns about the impact of HPS's solar production facility on property values, that she had moved to Harmony Township because of its rural nature and that proposed development would result in the loss of scenic views and take away from the beauty of the area (T, 137:25 – 143:24);
- Seth Tipton – 2774 River Road, questioned if HPS had requested relief for setbacks proximate to the properties situated in Block 38, if a condition could be imposed requiring HPS to cooperate with the neighbors in regard to buffering and the height of the proposed solar arrays as considered with the topography (T, 146:7 – 151:15);
- Theresa Chapman – 362 Brainards Road, testified that two neighbors in proximity to the project site had not received notice and questioned the height and adequacy of the proposed vegetative buffer as well as whether the Board's Class I and III members were eligible to vote on the application because it involved Township-owned property (T, 151:24 – 158:15);
- Joyce Bargowski – 2775 River Road, expressed concern about the developability of the site because of limestone and the possibility of sinkholes, that she had understood that the purpose of the Township's prior acquisition of Block 37, Lot 4 was to preserve the property for agricultural use and that she was concerned about the impact of the proposed facility on home values (T, 158:25 – 164:21);
- John Bargowski – 2775 River Road, questioned whether the proposed berm could be continued across from his property as well as the overall adequacy of the buffer and stated that the site was not an appropriate location for a solar production system (T, 165:4 – 172:7);
- Lois Markle – 2731 River Road, did not appear personally but instead had previously submitted an email which the Board secretary read into the record objecting to the application and the Zoom hearing format (T, 178:3 – 182:7); and
- Domenica Rothrock – 805 Ridge Road, objected to the virtual format on the basis that many elderly residents she knew lacked the ability to access the hearing and also objected to the proposed development because it conflicted with Harmony Township's rural character (T, 186:16 – 187:12).

Following the close of the public portion of the hearing, the Board engaged in brief period of deliberation during which Chairman Ward questioned the Board's attorney regarding

the adequacy of HPS's notice and whether the application could proceed to a vote. (T, 188:12 – 190:24) Upon receiving the advice of the Board's attorney that the application could proceed to a vote and clarifying the Board's voting members, a motion was made and seconded to approve HPS's application, including all relief requested, subject to compliance with Mr. Schrek's January 4, 2021 technical review letter. (T, 190:25 – 196:11) The motion was approved by a vote of 6-1, with Chairman Ward and Board members Sampson, Franceschino, Fohr, Tipton and Cornely voting in favor and Board member Troxel voting against. (T, 196:13 – 197:2). The Board subsequently memorialized its decision in a resolution entitled, "Harmony Township Land Use Board Resolution Memorializing the Grant of Preliminary and Final Major Site Plan Approval and Major Subdivision Approval with Variance and Waiver Relief with Certain Conditions to Application No. 20-2 Harmony Plains Solar I, LLC (Block 37, Lot 4, Block 38, Lots 2, 2.05 and 2.06, and Block 44, Lots 9, 10, 14 and 23)" (the "Resolution"), which the Board adopted on March 3, 2021. (P-11) HPS then caused a Notice of Decision to be published on March 9, 2021. (P-12) This litigation ensued.

VII. HARMONY TOWNSHIP LAND USE BOARD'S VERSION OF THE STATEMENT OF FACTS[4]

In October 2020, the Applicant filed an application with the Board for preliminary and final site plan approval and subdivision approval (the "Application"). The Application was submitted as part of HPS's proposed development of a solar production system on Block 37, Lot 4; Block 38, Lots 2, 2.05 and 2.06; and Block 44, Lots 9, 10, 14, and 23 (collectively, the "Properties"). P-11 at 1. The Application also involved a utility easement across Block 37, Lot 17.01. T 44:3-4. The Applicant possessed property control as it "ha[d] acquired or obtained leases in connection with all of the properties which are subject of [the] application." T 44:12-15.

The Application was deemed complete by the Board at its November 3, 2020 regular meeting. T 18:18-22.

The Application specifically sought to subdivide an existing property into two lots and to install a solar panel electric power system across several properties. P-10 at 1. As part of the site plan, the Applicant proposed site improvements including fencing, site roads, site driveways,

[4] The Board's version of the facts has been provided virtually verbatim from their brief for completeness of the record. Although the Board's version mixes some argument, it is generally an accurate depiction of the factual record.

electrical substation, stormwater facilities[,] and overhead /below ground electrical transmission lines through proposed easements." P-10 at 1.

On January 4, 2020, the Board's Engineer Stanley J. Schrek, PE, AIA, PP, CME, LEED AP prepared a review letter ("Review Letter") that was incorporated by reference into the subsequent approval. The Review Letter explained that the Properties were located in different zones, but that each of the zones were subject to the conditional use standards for solar production systems, which are set forth in Harmony Ordinance § 165-45.1.

In relevant part, the "primary purpose of this section is to provide regulations for the construction and operation of commercial solar facilities in the Township, subject to reasonable restrictions, which will preserve the public health and safety." § 165-45.1(A). To this end, the

Ordinance imposes eight "bulk and use requirements" upon solar production systems as follows:

> (1) Ground-mounted solar arrays for solar production systems are permitted as a conditional use in the AR-250 Agricultural/Residential Zone; the AR-300 Agricultural/Residential Zone; the AR-500 Agricultural/Residential Zone; the AR250/HDAH Zone; the CO-1 Commercial/Office/Business Zone One; the CO-2 Commercial/Office/Business Zone-Two; the LIO Light Industrial/Office Zone; the LI-O/C Light Industrial/Office/Commercial Zone; and the I-1 Industrial Zone Districts.
>
> (2) In order to minimize the removal of forest siting, priority is for land that has been cleared for at least five years prior to the proposal.
>
> (3) In no event shall a lot have more than 10% of the existing forested portion thereof cleared for ground-mounted solar production systems.
>
> (4) The minimum lot size must equal at least six acres per each megawatt (MW) of electrical energy produced.
>
> (5) No more than 80% of a lot may be devoted to a ground-mounted solar production system.
>
> (6) All ground-mounted solar production systems shall be set back a distance of 75 feet from all property lines and street right-of-way lines and within which no solar panels, inverters, interconnection equipment or other devices or facilities related to the use shall be located.
>
> (7) Ground-mounted arrays shall not exceed a height of 15 feet.
>
> (8) Ground-mounted solar panels and solar arrays shall not be considered to be an impervious surface, for the purpose of compliance with stormwater management regulations, unless installed above an imperious surface.
>
> [§ 165-45.1(D)].

On January 6, 2021, the Board held a hearing on the application. P-11 at 1. It was conducted on a virtual basis using the Zoom platform. P-11 at 1. The Applicant was represented by Jennifer

M. Porter, Esq. P-11 at 3. The Applicant presented testimony by Timothy Daniels, who was the Applicant's representative and co-founder of Dakota Power Partners, as well as the Applicant's professional planner, Christopher Nusser, PE PP of Engineering & Land Planning Associates, Inc. P-11 at 3; T 9:11-15.

The Applicant initially addressed the threshold issue of whether it satisfied the conditional use standards to proceed under § 165-45.1. Schrek explained that it would be easier to review the Application by addressing the need for waivers as the issues arose during testimony. T 18:23-19:3. Nusser was certified as an expert witness. T 22:1-4. He then explained how the Application complied with the various bulk and use requirements contained in the Ordinance. Based upon the testimony, the Board attorney determined that the Applicant did not require any (d) variances, and that the Board would be sitting as a Planning Board – and not a Zoning Board of Adjustment. T 39:18-40:11. The Applicant's counsel requested to proceed in the alternative providing proofs on the record for potential "d" variance relief. T 40:12-42:22.

Daniels introduced the project and his company's background. T 50:18-52:18. The project spans 593 acres and would generate solar capacity of 70 megawatts alternating current. T 53:11-19. The project involves a total investment of $90-100 million and is financed and designed for operation over 30 years. T 53:24-54:9. It is designed to produce enough power for 11,000 households, or approximately 25% of Warren County. T 57:11-12.

Nusser explained that the applicant sought subdivision of Block 38, Lot 2, which was the existing Garrison parcel, a 123-acre property. T 78:15-17. The purpose was to subdivide a three acre farm, house, and barns for preservation. T 78:20-23. This results in the need for a hardship c(1) variance for a non-conforming front yard setback on the property, as well as a c(2) variance for impervious coverage. T 79:11-80:18. Nusser opined there would be no negative impacts as the structure already exists. T 80:19-25.

Schrek noted that variances would be required to the extent electrical feeds did not comply with the setback requirement contained in § 165-45.1(D)(6). T 31:13-32:3.

After hearing from the Applicant's witnesses, the Board heard public comment from seven members of the public. P-11 at 6-7; T 137:10-16. Following the public comment, the Board commenced deliberations. T 194:4-196:1.

After deliberations, the Board held a roll call vote and approved the Application including all relief listed in the Board Engineer's review letter dated January 4, 2021, along with any technical requirements contained therein. P-11 at 7; T 196:2-9 The vote passed by a 6-1 margin, with members Sampson, Ward, Franchescino, Fohr, Tipton, and Cornely voting in favor, and Troxell voting against. P-11 at 7; T 196: 12-197:1-2.

The Board adopted its memorializing resolution at its March 3, 2021 meeting. Notice of this approval was published on March 9, 2021.

VIII. HARMONY PLAINS' VERSION OF THE STATEMENT OF FACTS[5]

A. The Property and Proposed Use

In October 2020 HPS filed its Application with the Board seeking preliminary and final site plan approval, subdivision approval and variance relief in connection with the proposed construction of a solar production system proposed on properties designated as Block 37, Lots 4 and 17.01, Block 38, Lots 2, 2.05 and 2.06, and Block 44, Lots 9, 10, 14, and 23 on the Tax Maps of the Township (previously defined as the "Project").

The property that was the subject of the Application (the "Property") consists of approximately 593 acres. At the time the Application was filed, the Property was owned by several different individuals or entities. More specifically, Block 44, Lots 9 and 10 were owned by 166 Brainards Road, LLC; Block 44, Lot 14 was owned by 715 Harmony Station, LLC; Block 44, Lot 23 was owned by R Habitats, LLC; Block 37, Lot 4 was owned by the Township of Harmony; Block 38, Lot 2 was owned by Roy C. and Brenda Garrison (See, e.g., Resolution of Approval (P-11) ¶ 2); and Block 37, Lot 17.01 was owned by Wood Glen Farm, LLC.

In connection with its Application and proposed improvements, HPS entered into option agreements to purchase or lease the relevant portions of those properties where improvements were proposed, and, accordingly, has an interest in all of the Property that is the subject of the Application.[6] See N.J.S.A. 40:55D-4.

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[5] Harmony Plains' version of the facts has been provided virtually verbatim from their brief for completeness of the record. Although the Board's version mixes some argument, it is generally an accurate depiction of the factual record.

[6] HPS has entered into Lease Option Agreements with 715 Harmony Station Road, LLC, 116 Brainards Road, LLC and Richard Crouse (Block 44, Lots 9, 10 and 14) and R Habitats LLC (Block 44, Lot 23); a Purchase Option Agreement with Roy & Brenda Garrison, Joyce Garrison and Melissa Garrison, and Christopher Wessner (Block 38, Lot 2); and an easement agreement with Wood Glen Farm, LLC (Block 37, Lot 17.01). Additionally, HPS has a Lease Option Agreement with the Township for Block 37, Lot 4 (the "Township Property").

By way of background, in 2019, the Township determined that it was in its best interest to lease the Township Property for a solar facility to generate more revenue for the Township and issued a Request for Proposal ("RFP"). HPS, through its parent company at the time, Dakota Power Partners, submitted the highest bid and was awarded the lease in accordance with the procedures set forth in the Local Public Contracts Law, N.J.S.A. 40A:12-1 *et seq*. (See Transcript of January 6, 2021 hearing, filed with the Court by Plaintiffs' counsel on May 11, 2021 ("Tr.") 80:15-19).

The lease was awarded pursuant to Ordinance 19-17, which the Township Committee adopted in September 2019. The Committee read and reviewed the Ordinance at two meetings and published it prior to the second hearing in accordance with the Local Lands and Buildings Law. Neither Plaintiffs nor any objectors appeared to protest the Committee's plans to lease the Township Property.

Therefore, without objection, HPS entered into a lease with the Township. The lease, like any municipal lease in contemplation of development, is contingent upon the receipt of all necessary local, county, state and other ancillary approvals required to utilize the Township Property for a solar production system. (Tr. 80:20-24).

B. Harmony Township Code

The Property spans across multiple zoning districts within the Township. The Project is located primarily within the AR-250 (Agricultural/Residential) Zoning District. Block 37, Lot 4 is located within the AR-250 Zoning District and the HD/AH (High Density Affordable Housing) overlay zone. Block 44, Lot 9 is entirely within the LI-O (Light Industrial/Office) Zoning District and Block 44, Lot 23 is partly within the LI-O Zoning District and partly within the I (Industrial) Zoning District.

A solar production system is a permitted conditional use within the AR-250, LI-O, and I Zones. (See, e.g., Tr. 97:20-98:2). A solar production system is defined within the Township's Zoning Code as a "solar energy system used to generate electricity." See Harmony Municipal Code (the "Zoning Code"), § 165-4, § 165-11, § 165-16.1, § 165-17. A "solar energy system" is defined as "a solar energy system . . . that is used to generate electricity."

A solar production system must comply with the following use and bulk requirements as set forth in the Zoning Code § 165-45.1(D):

1. Ground-mounted solar arrays for solar production systems are permitted as a conditional use in the AR-250 Agricultural/Residential Zone; the AR-300 Agricultural/Residential Zone; the AR-500 Agricultural/Residential Zone; the AR-250/HDAH Zone; the CO-1

Commercial/Office/Business Zone-One; the CO-2 Commercial/Office/Business Zone-Two; the LIO-Light Industrial/Office Zone; the LI-O/C Light Industrial/Office/Commercial Zone; and the I-1 Industrial Zone Districts.

2. In order to minimize the removal of forest siting, priority is for land that has been cleared for at least five years prior to the proposal.

3. In no event shall a lot have more than 10% of the existing forested portion thereof cleared for ground-mounted solar production systems.

4. The minimum lot size must equal at least six acres per each megawatt (MW) of electrical energy produced.

5. No more than 80% of a lot may be devoted to a ground-mounted solar production system.

6. All ground-mounted solar production systems shall be set back a distance of 75 feet from all property lines and street right-of-way lines and within which no solar panels, inverters, interconnection equipment or other devices or facilities related to the use shall be located.

7. Ground-mounted arrays shall not exceed a height of 15 feet.

8. Ground-mounted solar panels and solar arrays shall not be considered to be an impervious surface, for the purpose of compliance with stormwater management regulations, unless installed above an imperious surface

See Code § 165-45.1(D)

Additionally, the Code sets forth certain guidelines for the design of the use, including installation of certain wires, cables and transmission lines underground; siting of solar production systems so as to not impair scenic corridors; security; screening; landscaping; and implementation of design features in order to promote the minimization of impervious coverage and stormwater runoff. See Code §165.45.1(E).

C. Application for Site Plan Approval and Hearings Before the Harmony Township Land Use Board

In October 2020, HPS filed its Application with the Board. HPS submitted detailed site plans and an environmental assessment report. The Application was deemed complete on November 3, 2020, and a hearing was scheduled for January 6, 2021. (See P-11, pg. 1). HPS caused notice of the hearing to be published in the Star Ledger on December 23, 2020 and mailed to property owners within 200 feet of the subject properties on December 22, 2020. (Tr. 54:7-15).

The January 6, 2021 hearing was conducted remotely pursuant to the State of Emergency declared within the State of New Jersey as a result of the Coronavirus pandemic and

in accordance with regulations issued by the Department of Community Affairs pursuant to P.L. 2020, c. 34, enacted on May 15, 2020. As described more fully below, during the hearing, the Board made interpretations of its Zoning Code in connection with the proposed use's satisfaction of the aforementioned conditional use standards for solar production systems set forth in the ordinance and heard extensive testimony from Timothy Daniels, a representative of HPS, and Christopher Nusser, PE, PP, HPS' Engineer and Professional Planner, in support of the Application and relief requested.

1. The Board Appropriately Determined that HPS Met the Conditional Use Criteria

The Board's Professional Engineering Consultant, Stanley Schrek, PE, AIA, PP, CME, LEED, AP of Van Cleef Engineering Associates, discussed the eight conditional use criteria required for solar production systems with HPS's Professional Engineer and Professional Planner, Chris Nusser,[7] as set forth in the Board Engineer's January 4, 2020 report. (Tr. 19:12-39:17). The Board heard Mr. Schrek's testimony to determine initially whether HPS complied with all conditions of the Township's conditional use requirements or whether conditional use variance relief pursuant to N.J.S.A. 40:55D-70 would be required.[8] (Tr. 14:13-21).

- Regarding siting of the solar production system and the priority for the system to be located on land that has been cleared for at least five years before the proposal, and the requirement that no more than 10% of the existing forested portion of lands be cleared for construction of the system (see Code §165.45.1(D)(2) and 3), Mr. Nusser explained that HPS proposed no forested areas to be removed as part of the Application and none of the areas on which the improvements were proposed had been forest in the past five years. (Tr. 20:1-23:17).

- Mr. Nusser explained that the Project meets the requirement that the minimum lot size be six acres for each megawatt of electricity produced (see Code §165.45.1(D)(4)). (Tr. 23:21-24, 24:10-26:1).

- Mr. Schrek and Mr. Nusser agreed that the project complied with the requirement that the Project not exceed a height of 15 feet (see Code § 165.45(D)(7). (Tr. 48:2-6).

[7] Mr. Nusser was qualified and accepted as an expert in the fields of Professional Engineering and Professional Planning.

[8] To the extent the Board was to determine that conditional use variance were required, the Board would be voting as a zoning board, and relief would require a super-majority of five of seven affirmative votes.

- Mr. Schrek determined that the Project complied with Code § 165.45.1(D)(8) relating to stormwater management and impervious coverage. (Tr. 48:7-10).

With respect to the standards set forth in Code § 165.45.1(D)(5) and (6), Mr. Schrek explained that the Board must make two zoning interpretations in consultation with the Board Attorney. First, in connection with the requirement that no more than 80 percent of any lot may be devoted to a ground-mounted solar production system (See §165-45.1.D(5)), the Board determined that this percentage shall be calculated to include everything within the fenced-in area, i.e., the fenced area being the limits of the system and that this percentage requirement does not require that the remaining 20% of the land be viable for another use, consistent with other coverage requirements under the Zoning Code. The Board determined that it is simply a measure of the percentage of the lot that may be devoted to the proposed use. (Tr 35:16-36:25; see also P-11 ¶7). Mr. Nusser concluded, and Mr. Schrek confirmed, that the proposed project complied with this requirement. (Tr. 32:14-33:25).

Second, concerning Section 165-45.1.D(6)'s requirement that all ground-mounted solar production systems shall be set back a distance of 75 feet from all property lines and street right-of-way lines and within which no solar panels, inverters, interconnection equipment, or other devices or facilities shall be located, Mr. Schrek indicated that an interpretation would be required, as there were connecting electrical feeds between the lots that were located underground. (Tr. 27:1-22). Mr. Nusser explained that the lots on which the solar production system was proposed had electric lines interconnecting through them so that all the electricity generated could be interconnected to the electric grid. (Tr. 40:20-44:2). In discussing the meaning of this provision, the Board determined that inasmuch as any solar system would likely have interconnecting power lines constructed underground, the intent of the ordinance was to address aboveground equipment and did not include underground electric lines. (Tr. 46:8-47:23; see also P-11 ¶ 7). As such, the Board determined that the proposed solar production system also complied with this requirement. (Tr. 47:23-48:1).

Following the Board's interpretation of the Zoning Code, the Board Engineer and Board Attorney confirmed that HPS complied with the conditions set forth in Code § 165-45.1(D) for solar production systems. (Tr. 48:11-49:11). Accordingly, conditional use variance relief was not required. Id.

HPS indicated that even though it complied with all conditions set forth within the Township's Code for the solar production system (and that, as such, no variance from that

criteria would be necessary), HPS would also present additional testimony to demonstrate that the Project would also meet the standards necessary for a "D" variance, so that the "application is fully vetted before the Board" and so the Board has an understanding as to how HPS satisfies the requirements in the Township's Code as well as "the requirements of the Municipal Land Use Law and State Policy as well with respect to clean energy." (Tr. 52:15-53:20).

2. *Timothy Daniels*

Timothy Daniels is the co-founder of and partner in Dakota Power Partners, a developer of large-scale solar projects. As such, he oversees all New Jersey development projects, and, in particular, the Application. (Tr. 61:11-18; 63:23-64:6). Mr. Daniels was involved with identifying the sites, negotiating with landowners in order to obtain the required leases and/or easements, communicating with members of the community with regard to the Project, discussions with Township representatives and overseeing the permitting and development process. (Tr. 61:19-62:5).

After providing some background on Dakota Power Partners and its joint venture partner and investor, MAP Energy, a renewable energy investor (Tr. 63:23-65:21), Mr. Daniels provided an overview of the Application. Using a Powerpoint Presentation received by the Board as Exhibit A-1, Mr. Daniels discussed the location of the proposed solar production system (Tr. 66:2467:17). He noted that the system will span approximately 593 acres and will have a solar capacity of 70 megawatts, alternating current. (Tr. 67:22-25). Mr. Daniels also explained that the interconnection point will be an existing 115-kV JCP&L line that runs adjacent to the subject property and feeds the Merrill Creek Pump Station, and that the site would have access points along Garrison Road, Brainards Road and Harmony Station Road. (Tr. 67:25-68:12). He also explained how the system works and where the electricity generated by the site will go by providing an overview of the facility components, solar panels, racking system and safety considerations. (Tr. 85:9-90:18). Mr. Daniels also addressed the design life for the Project – i.e., the Project will be designed to operate for 30 years – and that HPS was anticipating partial operation in or around 2023. (Tr. 68:13-69:13).

Mr. Daniels also addressed the reasons that HPS chose this specific location for the solar production system. HPS chose the Property for several reasons, including its size, topography (specifically, the lack of steep slopes), access to high-voltage lines for the interconnection, and the condition of the surrounding distribution system. (Tr. 75:18-25).

Mr. Daniels explained that under the State's 2019 Energy Master Plan, the target was to achieve 50 percent of the total state electricity supply from renewables like wind and solar, by 2030 and 100 percent by 2050. (Tr. 70:12-16). He also noted that under the MLUL, solar production systems were considered an inherently beneficial use, similar to a school, hospital or childcare center. (Tr. 74:23-75:8).

Mr. Daniels explained the functioning of the solar energy system and its minimal effects on neighboring properties. Following construction, the Project would cause no significant noise, no water use or water discharge, minimal traffic, emissions-free power and no impact to town and county services. (Tr. 72:9073:10; 74:2-15). Mr. Daniels also explained that the solar panels will have no impact to surrounding property values in light of the buffers that are being created and vegetative screening being installed. (Tr. 73:23-74:1).

Mr. Daniels testified that, once operational, the power that the Project will produce can serve 11,000 households, or approximately 25 percent of Warren County. (Tr. 73:11-22). He also cited the economic benefits of the Project, which include lease payments, tax revenues, and creation of temporary construction and full-time equivalent jobs. (Tr. 80:5-83:6).

Finally, Mr. Daniels explained that once the Project stops operating, it will be decommissioned -- a process that entails deenergizing the Project, removing all equipment and returning the site to its original use. (Tr. 90:19-91:12).

3. Christopher Nusser

a. Engineering Testimony

The Board also heard detailed expert testimony in support of the Application from Mr. Nusser. Mr. Nusser reiterated that the Project was comprised of six parcels on which construction was proposed (Block 38, Lot 2; Block 37, Lot 4; Block 44, Lots 9, 10, 14, and 23), along with a utility easement on Block 37, Lot 17.01. He also reviewed the zoning, existing uses and topographic conditions for each of the lots, along with uses in the surrounding area. (Tr. 97:2-98:2, 98:25-101:17, 102:12-103:17).

Mr. Nusser also addressed the site plan layout for the Project (again confirming that the proposed improvements met the 75-foot setback and 15-foot maximum height requirements contained in the Township's conditional use ordinance) and noted that the solar array would be fenced in to allow access to other uses on the site. (Tr. 111:10-114:6). He explained that the solar production system would contain several access drives to allow access to electrical

equipment (which must be appropriately distributed throughout the site) for service and for access by emergency services if necessary. (Tr. 114:10-115:19, 116:21-117:2).

Mr. Nusser also described how the electricity generated from the solar array is collected, transferred to the switching station and substation to be located on site and ultimately connected to the grid. (Tr. 117:24-119:8).

Mr. Nusser also explained other aspects of the solar production system, including the proposed security gates (Tr. 119:9-17), lighting (Tr. 133:15-134:19) and compliance with stormwater requirements (Tr. 132:9-23).

With regard to grading, Mr. Nusser explained that inasmuch as the goal is to return the site to agricultural use following decommissioning, only limited grading was being proposed, existing drainage patters across the sites would remain, and there would be no importing or exporting of soil from the site. (Tr. 121:6122:20, 130:21-131:3). Access drives and internal roads would generally, except for some limited areas, comply with the Township's slope requirements, and, to the extent necessary, HPS requested a waiver for those areas, which request the Board's engineer supported. (Tr. 122:21-124:3).

Mr. Nusser also addressed the proposed landscaping in connection with the Project. Mr. Nusser confirmed that the ground cover underneath the proposed solar arrays would be native grasses, as required by the Township. (Tr. 136:14-137:12). With regard to landscape buffering, Mr. Nusser explained that HPS's approach was to look at different areas and to come up with different "modules" of various density to address buffering. The standard buffer was 50-foot-wide and comprised of a double row of 6-8 feet tall evergreen trees spaced about 20 feet apart. (Tr. 138:2-10). Additionally, HPS proposed "alternative buffers," comprised of a less dense mix of evergreen and deciduous trees, "enhanced buffers," which are comprised of 15-foot spacing, along with an additional row of cedar trees, "augmentation buffers," comprised of evergreens and cedars placed about 10 feet apart and a "shrub buffer", a mix of evergreen shrubs. (Tr. 138:11-139:15). According to Mr. Nusser, the different modules were employed at various locations throughout the site, depending on the sensitivity of the immediate surrounding area. (Tr. 139:23-142:1). Mr. Nusser, using Exhibits A-2, A-3, and A-4 (which included photo simulations of the buffers), demonstrated for the Board the various buffers, what they would look like and where each were employed. (Tr. 139:143:1, 145:13-21, 148:24-153:18, HPS-8).

Mr. Nusser discussed the design standards set forth in the conditional use ordinance relating to solar production systems. Mr. Nusser confirmed that the solar production system and

its associated equipment would not be used for advertising except as allowed by the ordinance and that the facilities would not significantly impair any scenic vista or scenic corridor; he also showed visual simulations of the proposed facilities, and finally, he reaffirmed that HPS took steps to preserve views of the Merrill Creek mountains. (Tr. 157:12-159:1). Mr. Nusser also confirmed that all cables and transmission lines complied with the Township's standards and that the access roads were designed to minimize lot coverage to the extent practicable within the project and would be constructed with semi-pervious material. (Tr. 159:9-23). Mr. Nusser confirmed that equipment would be appropriately labeled and there would be fencing to prevent unauthorized access. (Tr. 159:24-160:10, 113:6-9, 134:24-135:2).

Finally, Mr. Nusser indicated that the Project's landscaping would comply with the Township's requirements for ground cover and that HPS would comply with the Township's ordinance regarding facility abandonment. (See Tr. 160:14-16, 161:6-15).

Mr. Nusser addressed the proposed subdivision in connection with Block 38, Lot 2, which comprises 123 acres. (Tr. 103:24104:4). He explained that the purpose of the subdivision was to subdivide off a three-acre parcel that would contain the existing farmhouse and barns on the site so that they can be preserved and transferred to a new owner in the future. (Tr. 104:5-21). The proposed three-acre lot would conform to all of the Township's requirements as far as lot area, width and depth. The creation of the lot would require bulk variance relief in connection with the existing improvements on the property: (a) the existing front yard setback is 59 feet, whereas a minimum setback of 75 feet is required and (b) the impervious coverage for the proposed lot would 25.16% whereas a maximum of 10% is permitted. (Tr. 104:24-105:18).

Mr. Nusser described the community impact of the proposed project, including that change of ground cover would result in a more stable site with regard to soil erosion (Tr. 161:18-162:2); the development would have a minimal traffic impact once operational (Tr. 162:3-164:11); any noise generated by the inverters would be minimal and generated only in the daytime, would not impact neighboring properties, and would fall well within State noise code requirements (Tr. 165:20-166:10); the panels would have a minimal, if any, impact on glare (Tr. 166:11-167:4); and that, once operational, the Project would entail minimal demand on municipal and public services (Tr. 167:5-170:2).

b. Planning Testimony

(1) Solar Production System as an Inherently Beneficial Use

As noted above, despite the Board's determination that no "D" conditional use variance relief was required, HPS presented additional testimony to demonstrate that the proposed use met the stringent standards necessary to support granting of a "D" use variance, a higher burden of proof than a conditional use variance would require. Mr. Nusser testified that the proposed use, a solar production system, is an inherently beneficial use as noted by the MLUL, and that, as such, the appropriate standard of proof is to satisfy the standard as set forth in Sica v. Wall, 127 N.J. 152 (1992) (the "Sica standard"), where there is no enhanced burden of proof on the applicant to demonstrate that the proposed site is particularly suited to the use and advances the purposes of zoning. (Tr. 170:24-171:14). Mr. Nusser opined that while meeting this burden was not necessary, the site is particularly suited to the proposed use (Tr. 171:15-20), and the proposed use advanced many purposes of zoning, including purposes "n" (to promote renewable resources) and "a" (advancing the public health, safety, and general welfare, by providing clean, renewable energy to the immediate area, the county, and the State). (Tr. 171:25-172:12).

Mr. Nusser explained that under the Sica standard, the applicant must first identify the public interest at stake – here, to meet the State's renewable energy and solar power generation goals and objectives, as set forth in the State's Energy Master Plan, and that this type of facility is required to advance the public interest of providing clean, renewable energy. (Tr. 172:15173:7).

Mr. Nusser also explained that second prong of the Sica standard is to identify the potential detrimental effects that could possibly occur from the proposed use. Mr. Nusser testified that the Township's Code identifies and adequately protects against any potential negative impacts, by requiring, among other things, containing requirements for buffering, landscape requirements and access drives. (Tr. 173:8-23). And, by meeting all of the requirements of the conditional use, HPS had met its burden to address any detrimental impacts. (Tr. 173:24-174:11). In addressing the third and final prong of the Sica standard, Mr. Nusser explained that the positive benefits to the community resulting from the Project far outweighed any potential negative impacts associated with it. (Tr. 174:12-175:16).

(2) Bulk Variance Relief

Mr. Nusser addressed the two-lot subdivision proposed in connection with the Project and the justification for the variance relief. The purpose is to subdivide the farm property to

place the existing farmhouse and barns on that property so that they can be preserved; and the two variances required in connection with the subdivision were part of the attempt to preserve the structures - not in connection with any new proposed construction. Mr. Nusser explained that variance relief to continue the existing nonconforming condition in connection with the front yard setback was justified under the C-1 criteria, as it was due to the existing location of the house and that the only way to rectify the situation would be to remove the house, which would be a detriment to the community. (Tr. 105:19-106:7). Relief for impervious coverage was justified under the C-2 criteria because preserving the existing structures promotes a desirable visual environment by allowing the longstanding structures to remain.

With regard to both bulk variances, Mr. Nusser concluded there would be no negative impacts because the variances requested are a result of the existing features on the property. (Tr. 106:22-25). For example, Mr. Nusser explained that the negative impacts that could potentially come from increased impervious coverage will not be realized as there is no increased runoff associated with already existing impervious surface. (Tr. 106:25-107:16).

4. Comments from Members of the Public

During the hearing, the Board provided members of the public the opportunity to ask questions and make comments regarding the Application. The Board heard extensive comments from several Township residents, including Katie Higgins, Seth Tipton, Theresa Chapman, Joyce Bargowski, John Bargowski, Lois Markle, Domenica Rothrock and Roy Garrison. (Tr. 188:17-261:11; P-11 ¶ 17).

5. Concessions and Conditions Agreed to During the Hearing

During the Application process and prior to the hearing, HPS made modifications to its proposed project in order to address certain concerns raised by the Board's professional consultants. For example, HPS adjusted the layout and reduced the footprint of the site to ensure the Project complied with the Township's conditional use regulations relating to the 75-foot setback requirement and that no more than 80 percent of the lot be devoted to a ground-mounted solar production system. (Tr. 115:22-116:20; see also Tr. 117:2-15). This included removing solar arrays entirely from the properties designated as Block 38, Lots 2.05 and 2.06, as well as the significant removal of arrays from Block 37, Lot 4 from the area of River Road to provide additional separation to the homes on the north side of River Road. (Tr. 117:8-21).

During the hearing, HPS confirmed it would comply with all requirements set forth in Mr. Schrek's review letter, except as modified during testimony. (See, e.g., P-11 ¶ 14). HPS

also agreed during the hearing to cooperate with neighboring landowners concerning buffering between the solar production system and the adjacent properties. (Tr. 143:2-145:7, 202:23-203:6).

6. The Board's Approval of the Application

Following the public comment portion of the hearing, the Board commenced deliberations. Mayor Tipton cited the Application's positive aspects and opined that the positive aspects outweigh any negative effects. More specifically, he discussed that the lease option provides a financial benefit to the Township; the solar production would impact many residents in a positive way; and the Project would promote renewable energy while at the same time guaranteeing the Property will be available for agricultural use after the 30-year operational life. (Tr. 261:15-263:10). Mayor Tipton also referenced his appreciation for HPS's attempts to take steps through buffering and landscaping to minimize the impact of the system to neighboring landowners. (Tr. 163:11-18).

Mayor Tipton made a motion to approve the preliminary and final site plan and subdivision Application, inclusive of the requested variances in connection with the front yard setback and impervious coverage with all waivers as referenced in the Board Engineer's letter dated January 4, 2021, and subject to compliance with the technical requirements as set forth in the Board Engineer's January 4, 2021 letter. (Tr. 271:3-272:23). Mr. Cornely seconded the motion. (Tr. 272:23-25).

Accordingly, the Board granted HPS's Application after careful review and consideration of the Application, testimony, and objections raised during the hearing. Of the seven Board members present and eligible to vote on the Application, six members of the Board voted to approve the Application, with one Board Member, Mr. Troxell, voting against it. (Tr. 273:5-25).

D. The Board Adopts Its Resolution of Approval

The Board adopted a resolution of approval memorializing its decision on March 3, 2021 setting forth in detail the basis for approving HPS's Application. The Board's nine-page resolution contains a thorough recitation of the findings of fact, interpretations as to the conditional use standards for solar production systems and conclusions of law the Board made regarding HPS's Application. Notice of the Board's action was published on March 9, 2021. (P-12).

IX. COURT'S ANALYSIS AND DECISION

A. STANDARDS OF REVIEW

1. In General

The 1947 New Jersey Constitution preserved the substance of common law prerogative writ review by permitting parties to seek "review, hearing and relief" in the Superior Court of all actions of municipal agencies. N.J. Const. art. VI, §5, ¶4. This constitutional provision is implemented through New Jersey Rule of Court 4:69-1 by filing a Complaint in Lieu of Prerogative Writs against the municipal agency in the Superior Court, Law Division. Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993); Wallace v. City of Bridgeton, 121 N.J. 559, 563 (1972).

Although the standard of review of the Board's decision in this prerogative writ matter is well settled, the decision of the Board must be supported by the record and must not be arbitrary, capricious or unreasonable. Committee For A Rickel Alternative v. City of Linden, 111 N.J. 192 (1988); Medici v. BPR Company, 107 N.J. 526 (1987).

The applicant has the responsibility to present the Board with evidence necessary to allow the Board to decide according to its statutory mandate, the applicant's right to the relief sought. If the applicant fails to do so, the board has no alternative but to deny the application. Toll v. Bd. of Chosen Freeholders, 194 N.J. 223, 255 (2008); Tomko v. Vissers, 21 N.J. 226, 238 (1956); Chirichello v. Zoning Board of Adjustment of Monmouth Beach, 78 N.J. 544 (1979). This burden of proof is on the applicant both to establish the positive criteria are present and that no negative consequence to the community or the zone plan will occur if the variance is granted. New Brunswick Telephone vs. South Plainfield, 305 N.J. Super. 151 (App. Div. 1997).

It is a long settled principle of land use law that the judiciary must accord special deference to the decisions of zoning boards of adjustment and may reverse their decisions only where a board action is arbitrary, capricious or unreasonable. Kramer v. Sea Girt Board of Adj., 45 N.J. 268, 296-297 (1965). Particularly in cases where a board of adjustment's denial of a variance is at issue, the action of the board of adjustment is presumptively correct and its denial will not be overturned unless it is unreasonable, arbitrary or capricious. Rowatti v. Gonchar, 101 N.J. 46, 52 (1985).

A zoning board, or in this case a joint land use board, "because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion." Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965). "That board's decisions enjoy

a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Price, 214 N.J. at 284 (citing Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2005)). Thus, the burden on a challenging party is to show that the board's decision was "arbitrary, capricious, or unreasonable." Kramer, 45 N.J. at 296.

Moreover, a local board may also bring to bear in its deliberations the general information and experience of its individual members. Griggs v. Zoning Bd. of Adjustment of Borough of Princeton, 75 N.J. Super. 438 (App. Div. 1962). Further, it has been recognized that greater deference is ordinarily given to a denial of a variance than to a grant of a variance. Med. Ctr. v. Princeton Tp. Zoning, 343 N.J. Super. 177, 199 (App. Div. 2001). This reflects the general concern voiced by the courts that only exceptional cases warrant use variances since there exists a strong legislative policy favoring land use planning by ordinance rather than by variance. Medici v. BPR Co., 107 N.J. 1, 21- 23 (1987). Generally speaking, more is to be feared from ill-advised grants of variances than by refusals thereof. Beirn v. Morris, 14 N.J. 529,536 (1954). Use variances should be granted sparingly and with great caution since they tend to impair sound zoning. Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967).

As explained in In re Xanadu Project, 402 N.J. Super. 607, 642 (App. Div. 2008):

> "The term 'arbitrary and capricious' in the law means having no rational basis. In connection with administrative bodies, the term means 'willful and unreasonable action, without consideration and in disregard of circumstances.'" (internal citations omitted)
>
> "[B]ecause of their peculiar knowledge of local conditions, [boards of adjustment] must be allowed wide latitude in their delegated discretion." Jock v. Zoning Board of Adj. of Wall Twp., 184 N.J. 562, 597 (2005). Therefore, the "proper scope of judicial review is not to suggest a decision that may be better than the one made by the Board, but to determine whether the Board could reasonably have reached its decision on the record." 402 N.J. Super. at 642.

The Municipal Land Use Law provides pertinently:

> 40:55D-70. Powers. The Board of Adjustment shall have the power to:
>
> a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance;
>
> b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act;
>
> …

> d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) a use … in a district restricted against such use …
>
> …
>
> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance….

2. Regarding whether a Court should substitute its own judgment for that of the Board

A trial court in reviewing a board decision cannot consider the matter anew or substitute its judgment for that of the board. People Trust Co. v. Hasbrouck Heights Board of Adj., 60 N.J. Super. 569, 573 (App. Div. 1959). Further, the judgment of the trial court cannot be based on matters outside the record made before the board. Id.[8] Judicial review of a board decision under the arbitrary, capricious and unreasonable standard must be made on the basis of what was before the board and not on the basis of a trial de novo. Antonelli v. Waldwick Planning Board, 79 N.J. Super. 433, 440-441 (App. Div. 1963). "The record made before the Board is the record upon which the correctness of the Board's action must be determined . . . ." Kramer v. Sea Girt Board of Adj., 45 N.J. 268, 289 (1965).

However, when reviewing a Board's interpretation of its ordinances, there is generally a deferential standard given to a Board's interpretation:

> [W]e "give deference to a municipality's informal interpretation of its ordinances." *Ibid*. See also *Wyzykowski v. Rizas*, 254 *N.J. Super*. 28, 38, 603 A.2d 53, 59 (App. Div. 1992), *aff'd in part, rev'd in part*, 132 *N.J*. 509, 626 A.2d 406 (1993). Thus, planning boards are granted "wide latitude in exercise of the delegated discretion" due to their "peculiar knowledge of local conditions." *Burbridge*, *supra*, 117 *N.J*. at 385, 568 A.2d at 532 (quoting *Kramer*, *supra*, 45 *N.J*. at 296, 212 A.2d at 169). Indeed local officials are "thoroughly familiar with their communities' characteristics and interests" and are best suited to make judgments concerning local zoning regulations. *Pullen v. Twp. of South Plainfield*, 291 *N.J. Super*. 1, 6, 676 A.2d 1095, 1097 (App. Div. 1996) (citing *Ward v. Scott*, 16 *N.J*. 16, 23, 105 A.2d 851, 855 (1954); *Bellington v. Twp. of East Windsor*, 32 *N.J. Super*. 243, 249, 108 A2.d 179, 182 (App. Div. 1954), *aff'd*, 17 *N.J*. 558, 112 A.2d 268 (1955). *Fallone Properties, LLC v. Bethlehem Twp. Planning Bd.*, 369 *N.J. Super*. 552, 560-561 (App. Div. 2004).

This same proposition has been noted in Cox & Koenig, *N.J. Zoning & Land Use Administration,* §26-2.3(2017) (noting that "…planning boards have always had to interpret the meaning of the zoning ordinance in connection with and incident to applications for other relief…").

As part of the rationale to support the Court's finding in this matter, again, the Court recognizes the deference due to a board in relation to local matters, since a board is assumed to have knowledge that a court will not, concerning local matters.

The public policy that provides the Board with a measure of deference when interpreting its own ordinance allows the Board "some" leeway to construe their own regulations in a manner that is reasonable and in conjunction with the intent of the provision. It also promotes a consistent approach that permits the Board to uniformly apply its regulations to all developments in the Township – which includes developments which were approved but not appealed to the Courts.

That is not to say that the Court can ignore the clear meaning of a local Ordinance. Nor can a Court interpret a local ordinance in a manner that is contrary to law or in a manner that is not supported by the Municipal Land Use Law ("MLUL"). Legislation is not to be given an absurd construction by reading it literally, but rather one that will advance the sense and meaning of it. Lesniak v. Budzash, 133 *N.J.* 1, 14 (1993). One must recall the reasoning of Judge Learned Hand, who stated, "There is no surer way to misread any document than to read it literally." Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944), *aff'd sub nom*. Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

Also, "Ordinances should be liberally construed in favor of the municipality." Trust Company of New Jersey v. Planning Board of the Borough of Freehold, 244 N.J. Super. 553, 568 (App. Div. 1990). "As our courts have long recognized, 'public [land use] bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adj. of Wall, 184 N.J. 562, 597 (2005). Also see Atlantic Container, Inc. v. Twp. of Eagleswood Planning Board, 321 N.J. Super. 261, 274 (App. Div. 1999), in which the Appellate Division overturned the trial court and reinstated the planning board's decision in interpreting its zoning ordinance. Fallone Properties, LLC v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 561-562 (App. Div. 2004), also underscores the importance of according deference to a local board because of the local body's familiarity with the circumstances and conditions in their community. In reversing the trial court, the Appellate Division noted:

> Indeed, local officials are thoroughly familiar with their communities' characteristics and interests and are best suited to make judgments concerning local zoning regulations … By the same token, although we construe the governing ordinance *de novo*, we recognize the board's knowledge of local circumstances and accord deference to its interpretation.

3. Regarding The Evidence To Be Considered By The Court

The Board decision to be reviewed by the court is evidenced by its written memorializing Resolution No. 2017-03C, which contains the Board's factual findings and conclusions as required by the MLUL, specifically, N.J.S.A. 40:55D-10g. It is well settled law that comments made by Board members during a hearing and during deliberations cannot be equated with Board findings and conclusions which must statutorily be set forth in the written resolution. As explained in New York SMSA v. Weehawken Board of Adj., 370 N.J. Super. 319, 334 (App. Div. 2004), remarks of Board members "represent informal verbalization of the speaker's transitory thoughts; they cannot be equated to deliberative findings of fact."

As the New York SMSA court held: "It is the resolution, and not Board member deliberations, that provides the statutorily required findings of facts and conclusions." Id. See also, Hawrylo v. Harding Twp. Board of Adj., 249 N.J. Super. 568, 575 (App. Div. 1991), where the court rejected plaintiff's contention that comments made by Board members during the hearing revealed consideration of inappropriate criteria and vitiated the resolution adopted by the Board. Because the resolution of the Board "is the wellhead for the judiciary's consideration of the validity of municipal action," CBS Outdoor v. Lebanon Planning and Zoning Board, 414 N.J. Super. 563, 580 (App. Div. 2010), "the resolution must rise or fall on its merits." Scully-Bozarth Post 1857 of the VFW v. Burlington Planning Board, 362 N.J. Super. 296, 313-314 (App. Div. 2003), certif. denied, 178 N.J. 34 (2003).

As explained in In re Xanadu Project, 402 N.J. Super. 607, 642 (App. Div. 2008):

> The term 'arbitrary and capricious' in the law means having no rational basis. In connection with administrative bodies, the term means 'willful and unreasonable action, without consideration and in disregard of circumstances.' (internal citations omitted).

The court in D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990), approved in, Kiernan v. Kiernan, 355 N.J. Super. 89, 93 (App. Div. 2002), may have summed it up best when it explained that a "decision is not arbitrary, capricious or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp."

4. Regarding C-2 Variances Generally

In this matter, the Defendant Solar requested and was granted a "C" variance under N.J.S.A. 40:55D-70(c)(2) and, as such, the determination of whether that award was appropriately granted is "in issue." As such, the Court will review the standard for that type of

variance. In the context of a "C-2" dimensional variance, the applicant bears the burden of establishing both the positive and negative criteria required for a variance under N.J.S.A. 40:55D-70(c)(2). Nash v. Board of Adjustment of Morris Twp., 96 N.J. 97 (1984). As noted in Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996), when hearing a C-2 application, a land use board must:

> 1. consider whether the specific variances sought will advance the purposes of the MLUL; (2) weigh the benefits of the variance against "any detriment"; and (3) consider whether they can be granted without substantial detriment to the public good or impairment of the intent and purpose of the zone plan and zoning ordinance.

As the Court in Kaufmann v. Planning Board for the Twp. of Warren, 110 N.J. 551, 562 (1988) noted, the grant of a C-2 variance "must be rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL." Importantly, the court also stated:

> By definition, then, no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, … [will be] on the characteristics of the land that present an opportunity for *improved* zoning and planning that will benefit the community.

Id. at 563 (first emphasis added) (second emphasis in original).

5. Regarding (d)(1) Variances Generally

In this action, Plaintiff argues that a "use variance" pursuant to N.J.S.A. 40:55D-70(d)(1) was required and that the Defendant Solar found failed to request and demonstrate entitlement to that type of variance. As such, the Court will review the applicable standard, N.J.S.A. 40:55D-70(d)(1) provides that a zoning board of adjustment has the authority to grant use variances from zoning regulations provided the applicant satisfies the positive criteria (also known as special reasons) and the negative criteria. Price v. Himeji, 214 N.J. 263 (2013); Medici v. BPR Co., 107 N.J. 1, 18 (1987); Saddle Brook Realty v. Saddle Brook ZBA, 388 N.J. Super. 67 (App. Div. 2006). The standard of "special reasons" for the grant of "d" variances has been defined as those, which advance the purposes of zoning listed in N.J.S.A. 40:55D-2. Damurjian v. Board of Adjustment of Colts Neck, 299 N.J. Super. 84, 93 (App. Div. 1997); Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 380 (1995). For the negative criteria, the applicant must prove "the variance can be granted without substantial detriment to the public good and that it will not substantially impair the intent and purpose of the zone plan and zoning ordinance." Sica v. Township of Wall ZBA, 127 N.J. 152, 156 (1992) (quoting N.J.S.A. 40:55D-70(d)) (internal quotations omitted).

Pursuant to N.J. Ct. R. 4:69-1, actions of a municipal body must be overturned when its exercise of discretion is arbitrary, capricious or unreasonable, not supported by evidence, or otherwise contrary to law. See Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81-82 (2002), Rivkin v. Dover Township Rent Leveling Board, 277 N.J. Super. 559, 569 (App. Div. 1994), aff'd, 143 N.J. 352, 378 (1996). The burden to demonstrate that the board's decision was arbitrary, capricious or unreasonable falls on the challenging party. Price, 214 N.J. at 284.

However, a court's review a board's application and conclusions of law is de novo. Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993). Determining whether a board's action is arbitrary, capricious and unreasonable entails "a nearly simultaneous reading of the entire verbatim transcript and analysis of documentary evidence presented as exhibits before the board" and "involves a searching review of the points of error highlighted by the parties in their arguments in briefs and at trial." Witt v. Borough of Maywood, 328 N.J. Super. 432, 453 (Law Div. 1998).

B. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE THE BOARD'S CLASS I AND III MEMBERS POSSESSED UNWAIVABLE CONFLICTS OF INTEREST?

1. Plaintiffs' Argument Summarized

Plaintiffs advocate that given the significant financial windfall that Harmony Township stood to gain with the approval of HPS's application, Mayor Brian Tipton and Committeeman Richard Cornely possessed "unwaivable conflicts of interest" as the Board's respective Class I and III members. Plaintiffs submit that their participation and voting on HPS's application as compensated members of the governing body irrevocably tainted the Board's proceedings. Plaintiffs therefore submit that this situation compels the invalidation of the Resolution and all approvals memorialized thereby, as a matter of law.

2. Applicable Law Summarized

Certainly, as a general proposition, New Jersey courts have long recognized the significant ethical obligations attendant to the holding of public office. In this regard, it has been stated that "the American concept of public office is that of a public trust created in the interest and for the benefit of the people." Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 567 (Ch. Div. 1950). "The administration of the government ought to be directed for the good of those who confer and not of those who receive the trust. The officers of the government are trustees and both the trust and trustees are created for the benefit of the people." Id. (quoting

Rankin v. Board of Education of Egg Harbor Tp., 135 N.J.L. 299, 303 (E & A 1946)). "Public officials are obligated, virtute officii, to perform their duties honestly, faithfully, and to the best of their ability, and to bring to the discharge of their duties that prudence, caution and attention which careful men usually exercise in the management of their own affairs." Id. (citing United States v. Thomas, 82 U.S. 337 (1873); State v. Erie Railroad Co., 23 N.J.Misc. 203, 213 (Sup.Ct. 1945)). The law demands exclusive loyalty to this end and tolerates no mingling of self-interest. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 500 (App. Div. 1956).

In recognition of the foregoing principles, in 1991 the Legislature enacted the Local Government Ethics Law, N.J.S.A. 40A:9-22.1, et seq. ("LGEL") "to establish a statutory code of ethics covering the officers and employees of most local governments and their agencies and instrumentalities." Assembly State Government Committee Statement, 1993 Main Volume, Senate No. 2027-L.1991, c. 29. These ethical strictures are set forth at N.J.S.A. 40A:9-22.5 and apply equally to mayors, council persons and land use board members. Piscitelli v. City of Garfield Zoning Bd. of Adj., 237 N.J. 333, 350 (2019). Indeed, the LGEL establishes certain absolute prohibitions for such persons, including the following:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

N.J.S.A. 40A:9-22.5.d.

The LGEL expanded the scope of conflicts originally established by common law and codified by the MLUL. See N.J.S.A. 40:55D-23(b); Shapiro v. Mertz, 368 N.J. Super. 46, 53 (App. Div. 2004) ("Instead of using the words 'any personal or financial interest,' as used in the MLUL, the Legislature instead chose to utilize the words 'financial or personal involvement.'"). Plaintiffs interpret that change to mean that it is not necessary to demonstrate that the conflicted public official had a dishonest intent. Id. Rather, Plaintiffs posit that it is the **potential** for conflict which is determinative of the analysis. Id. That is to say, "it is the existence of [conflicting] interests which is decisive, not whether they were actually influential." Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960). Accordingly, when undertaking a conflict of interest analysis, the question for the court's consideration is "whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958). The public official in question need not even be aware of the potential conflict. Griggs, supra, 33

N.J. at 219. In this same vein, the Supreme Court has instructed that N.J.S.A. 40A:9-22.5.d must be construed to further the Legislature's "expressed intent that '[w]henever the public perceives a conflict between the private interests and the public duties of a government officer,' 'the public's confidence in the integrity' of that officer is 'imperiled.'" Piscitelli, 237 N.J. at 351 (quoting N.J.S.A. 40A:9-22.2.b to c).

Even before either the enactment of the MLUL or the LGEL, New Jersey courts recognized and applied common law principles to prevent municipal officials from becoming involved in situations implicating a conflict of interest. The Supreme Court reaffirmed these principles in Wyzykowski v. Rizas, 132 N.J. 509 (1993). Specifically, four (4) situations mandate disqualification under common law:

> (1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or a family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect personal interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
>
> Id. at 525-526 (quoting, Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980 at pp.8, 9)).

It is true that because Boards of Adjustment and Planning Boards are quasi-judicial bodies, their judgment must be free from the taint of self-interest. Whether a Board Member has a conflict of interest and should be disqualified is determined pursuant to the common law, the MLUL and the Local Government Ethics Law. In addition, Boards may adopt their own rules and regulations not inconsistent with those sources, although that appears not to have been done in this case.

In that regard, if a Board Member has an interest in the subject matter of the proceeding, the interested Board Member is disqualified and the Member's participation in any decision will make it subject to attack and may lead to its overturning by a reviewing Court.

The decision as to whether a particular interest is sufficient to disqualify a Board Member is a factual one and depends upon the circumstances of a particular case. Again, "[t]he question will always be whether the circumstances can be reasonably interpreted to show that they had a likely capacity to tempt the official to depart from his sworn duty." Wyzykowski v. Razis, 132 N.J. 509, 523 (1993); Van Itallie v. Franklin Lakes, 28 N.J. 258 (1958). See also Care of Tenafly

v. Tenafly Bd. of Adj., 307 N.J. Super. 362, 369-370 (App. Div.), cert. den. 154 N.J. 609 (1998), noting that while the issue is fact sensitive to be decided on a case-by-case basis, there are abundant decisions providing guidance and specific fact patterns as well.

In Wyzykowski v. Razis, supra. at 525-526 the court outlined four circumstances which under the common law indicate a conflict: (1) direct pecuniary interest; (2) indirect pecuniary interest, as when an official votes on a matter that financially benefits one closely tied to the official, such as an employer or family member; (3) direct personal interest, as when an official votes on a matter that benefits a blood relative or a close friend in a non-financial way, but in a manner of great importance; and (4) indirect personal interest, as when an official votes in a manner in which his or her judgment may be affected because of membership in some organization.

Again, the MLUL, the Local Government Ethics Law and the common law and any local rules and regulations governing conflicts or ethics all apply when determining the existence of a conflict. That is that common law may be available to fill in the gaps or ambiguities when applying the MLUL or the Local Government Ethics Law. See Wyzykowski v. Razis, supra.

The Court notes that in Paruszewski v. Tp. of Elsinboro, 154 N.J. 45, 57-60 (1998). The court held that members of the zoning board did not have a conflict of interest arising solely out of the fact that they were appointed by the "township" when the governing body of the township, represented by the township attorney, appeared before the board to take a position with regards to a particular application. In that case, the court rejected the argument that they either had an indirect pecuniary or indirect personal interest based solely on their status as members of the board.

Conflicts of interests in certain circumstances can arise as a result of the simultaneous holding of certain public positions. See Reilly v. Ozzard, 33 N.J. 529 (1960). In these circumstances, the law is clear that the public official may not act on the matter. Id. at 550 (citing Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960)). Moreover, it will not suffice for the conflicted person to simply avoid voting; rather, the affected public official must remove him or herself from all aspects of the matter and refrain from participating in any way. See Darrell v. Governing Body of Township of Clark, 169 N.J. Super. 127, 132-133 (App. Div. 1979), aff'd on other grounds, 82 N.J. 426 (1980); Aldom v. Borough of Roseland, 42 N.J. Super. 495, 500 (App. Div. 1956); Scott v. Bloomfield, 94 N.J. Super. 592, 600-601 (Law Div. 1967), aff'd on other grounds, 92 N.J. Super. 321 (App. Div. 1967), appeal dismissed, 52 N.J. 473 (1968).

The Appellate Division has previously addressed the conflict of interest which can arise when a public official simultaneously maintains positions with a land use board and another public body. In Sokolinski v. Municipal Council of Woodbridge, 192 N.J. Super. 101 (App. Div. 1983), the Woodbridge Township Council filed a declaratory judgment action to ascertain whether three regular and two alternate members of the Woodbridge Board of Adjustment were disqualified from hearing variance applications involving property owned by the Woodbridge Board of Education, which employed two of the members and the spouses of the three others. The trial court ruled that all five possessed conflicts of interest which precluded their participation in the proceedings. The Appellate Division affirmed on appeal and explained, in relevant part:

> A member of a board of adjustment, like any taxpayer, is understandably inclined to favor increasing public revenues to contain taxes. However, unlike other taxpayers, he has a specific duty not to sacrifice the proper use of land on the altar of reduced taxes. This conflict is tolerated because it inheres whenever a variance is sought that would increase public revenues. But when the applicant is the member's employer, an additional conflict occurs which is avoidable and therefore not acceptable. As our Supreme Court has said, **"…[I]t is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case.**" Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 557 (1952).
>
> The Board of Education particularly benefits from the grant of these variances. Money realized from the sale of the schools and money saved by not having to maintain them will ease the Board's revenue requirements. **Also, individual Board members standing for re-election can point to these sales as an accomplishment.**

Id. at 104 [Emphasis supplied].

3. Court's Analysis and Decision

Plaintiffs argue that the very same conflict of interest principles examined by the Appellate Division in Sokolinski which precluded the participation of the affected members in that case also compel the invalidation of the Board's action in this case. By way of explanation, HPS's application sought, inter alia, approvals for the development of Block 37, Lot 4, which property is owned by Harmony Township and which property is the subject of a Lease Option Agreement entered into between HPS and Harmony Township. The Lease Option Agreement provides for the payment of $50,000.00 per year from HPS to Harmony Township. Plaintiffs note that according to discovery obtained in this matter, Harmony Township has already required $112,500.00 from this arrangement. But Plaintiffs assert that this is "just the tip of the proverbial financial iceberg." The Lease Option Agreement grants HPS an exclusive option to lease Block 37, Lot 4 from Harmony Township in accordance with the terms of a Solar Site Lease

Agreement which, if exercised, provides for the payment of rent from HPS to Harmony Township in the annual amount of $350,000.00. As such, Plaintiffs contend that as a result of that circumstance, Mayor Tipton and Committeeman Cornely have an inherent, unwaivable conflict that tainted the approval in this case.

Plaintiffs aver that the key to whether HPS ultimately proceeds with the Solar Site Lease Agreement resides with the development application that is the subject of this case. In other words, the approval of the application allows HPS to move forward. The denial of the application effectively "kills the deal." Plaintiffs therefore postulate that this is in fact the crux of the conflict of interest which affected both Mayor Tipton and Committeeman Cornely and which should have precluded their participation.

Plaintiffs submit that the potential revenue stream from the Solar Site Lease Agreement would of course benefit Harmony Township and all of its residents generally but also Mayor Tipton and Committeeman Cornely specifically, both of whom participated in the hearing and both of whom voted in favor of the approval. Plaintiffs offer that in the first instance, both Mayor Tipton and Committeeman Cornely are employed by Harmony Township. Plaintiffs argue that as recognized by the Appellate Division in Sokolinski, this employment relationship distinguished them from the remainder of the tax-paying public and created an additional conflict which was "not acceptable." Id. at 104. Also, Plaintiffs point out that both men when standing for re-election could potentially point to the HPS deal and the ensuing revenue stream as an "accomplishment". Id.

Plaintiffs therefore conclude that the foregoing confirms that both Mayor Tipton and Committeeman Cornely possessed unwaivable conflicts of interest under long-standing New Jersey decisional law. According to the Plaintiffs, these facts, however, also support that very same conclusion as measured against the applicable statutory standards. Plaintiffs offer by example, contrary to the LGEL, by participating and voting on HPS's application, both men acted in their official capacities in a matter in which they possessed an "indirect financial or personal involvement that might be reasonably expected to impair [their] objectivity or independence of judgment." N.J.S.A. 40A:9-22.5.d. Plaintiffs indicate that similarly, both Mayor Tipton and Committeeman Cornely breached the MLUL's prohibition against acting on a matter in which they had "either directly or indirectly, any personal or financial interest." N.J.S.A. 40:55D-23.b.

Plaintiffs therefore conclude, and ask the Court to find, that whether adjudged under the standards established by New Jersey decisional law, the LGEL or the MLUL, both Mayor Tipton and Committeeman Cornely possessed "unwaivable conflicts of interest." Nevertheless, both men participated and voted on HPS's application in their respective capacities as Class I and III Board members. For those reasons, Plaintiffs submit that the Board's actions in allowing the same to occur were arbitrary, capricious and unreasonable and must be invalidated.

Effectively Plaintiffs argue that the Class II (Mayor) and Class IV (Governing Body Member) have inherent conflicts of interest here since the Township has an interest in the outcome of the Defendant's site plan and variance applications. The Plaintiffs reason that since the Mayor and Governing Body entered into a contract with the Defendant Solar to use the Township's land in the manner contemplated by the Defendant's site plan, and the Township will benefit by the approval of the Defendant's application, that there is a relationship between them with their dual interests or responsibilities. Also, the Plaintiffs offer that since the Mayor and Governing Body representative on the Planning Board are paid "employees" of the Township, that the Court should determine their relationship is a conflict of interest that the Plaintiffs asks the Court to recognize.

Of course, the Court's finding on an issue like this one would or could have ramifications that extend beyond this matter, as municipalities and their governing bodies are oftentimes interested in applications before their Local Boards. However, our Courts have recognized that Governing Bodies of municipal bodies may have a probative interest in the outcome of certain applications before its Boards and those interests don't automatically prohibit participation. Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54 (1998).

In fact, the Court recognizes that a municipal body has a right, and perhaps a public duty, to appear before a Planning Board or Board of Adjustment in matters that it finds in the public interest. The holding in Paruszewski recognizes that the members of the local governing body hold a position of public trust that inherently imbues them with a right, standing and perhaps even an obligation to voice the position of the body to the local board in matters of public interest. In Paruszewski, the Court recognized that although the legal jurisdiction of these bodies are specialized and exclusive, the ramifications of their decisions can certainly overlap into the realm of the other municipal bodies as well.

The Plaintiffs' view of a conflict of interest appears to be that any overlap or opinion or view that a municipal officeholder may have should be an unwaivable conflict without regards to

the surrounding circumstances. This Court, however, does not take such an inflexible, strict or draconian approach.

In Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54 (1998) the court recognized that in conducting its inquiry, the Court must strike a delicate balance:

> [C]ourts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials.

[Id. at 523-24, 626 A.2d 406 (quoting Van Itallie, supra, 28 N.J. at 269, 146 A.2d 111).]

"The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, 'Universal distrust creates universal incompetency.' " Van Itallie, supra, 28 N.J. at 269, 146 A.2d 111 (quoting Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L. Ed. 319, 324 (1913)). Although there need be only the "potential for conflict" to justify disqualification, " '[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions.'" Rizas, supra, 132 N.J. at 524, 626 A.2d 406 (alteration in original) (quoting LaRue v. Township of E. Brunswick, 68 N.J. Super. 435, 448, 172 A.2d 691 (App. Div. 1961)). But see South Brunswick Assocs. v. Township Council, 285 N.J. Super. 377, 382-84, 667 A.2d 1 (Law Div.1994) (holding township council's president could not appear as advocate before zoning board and subsequently participate in quasi-judicial review of same matter).

In so doing, the court recognized that the members of a Governing Body are presumed to be acting in the public interest as duly elected officials who have taken a sworn oath to uphold their constitutional and statutory responsibilities. Certainly we can expect that a Mayor (Class I Member) and the Governing Body (Class III) Member understood and respected that duty and obligation when they voted as Governing Body members to approve the lease agreement with Defendant Harmony Plains. In fact, the Plaintiffs do not dispute that proposition.

When the general proposition that underlies the Plaintiffs' position is applied, however, Plaintiffs' theory is unrealistic and implausible on its face. See, e.g., LaRue v. Tp. of E. Brunswick, 68 N.J. Super. 435, 448 (App. Div. 1961) ("There cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions."). In fact, aren't all development plans supposed to benefit the Township financially or otherwise? If Plaintiffs are speculating that these officials will tout the accomplishment in

their reelection campaigns, isn't the resulting inference that they believe the Project is good for and favored by the Township's citizens? There is no reasonably conceivable reason to believe that the low salaries/stipends of these officials could not be paid without the rent from the lease in connection with the Project?

Certainly when the Mayor and Governing Body members voted to approve the lease agreement with Defendant Solar, they understood that the Defendant HPS would have to appear before the Planning Board to obtain a site plan and conditional use approval before they could construct the project. In fact, the contract provided for a contingency that indicated that if site plan approval was not obtained, that the contract was void or voidable.

That contingency does not create an automatic conflict of interest for the Mayor and Governing Body member however. The Mayor and Governing Body member approved the lease agreement with Defendant HPS Solar with the Township because they believed that the business arrangement was in the best interest of the Township and its constituents.

That determination does not, however, mean that the Mayor and Governing Body Member were pre-approving or endorsing the approval of a site plan that had yet to be presented a public hearing before the Planning Board as required under the MLUL. In fact, when they became members of the Planning Board, the Mayor and Governing Body Member took a separate oath to uphold the law applicable to the Planning Board.

Importantly, the MLUL establishes the composition of the Planning Board which statutorily requires that the Mayor and a Governing Body representative as members of the Board. As Board Members they take a separate oath to abide by the law as part of their duties with the Board. The MLUL establishes Planning Boards to consider to exercise certain specific statutory duties including (1) adopt the Master Plan; (2) perform subdivision and site plan review as to permitted uses; (3) recommend changes to the official map of the Township; (4) hear conditional use applications; (5) recommend zoning ordinance or amendments thereto; and (6) recommend with regards to capital improvement program for the municipality. In this matter, Harmony Planning Board was exercising its site plan review function along with its review of the Defendant Solar's plan as a conditional use.

The Planning Board is largely a consultative agency for the governing body which is expert in land use planning. The Planning Board aids the Governing Body in helping to establish longer term and broad planning objectives through the adoption of the Master Plan and through its consultative and advisory role in the adoption of land use ordinances. It is the governing body,

however, that is responsible for the ultimate planning decision making. In its hearing of particular applications (in which the Township is an applicant), the Planning Board is limited essentially to technical compliance review. See Cox, New Jersey Zoning and Land Use Administration, §4-3.2) In fact, other than its ancillary power to grant limited variances, the Planning Board does not have the power to grant use variances, the Planning Board does not have the power to allow variances from the planning decisions that the Governing Body has adopted as part of its Zoning Ordinance. In fact, the Board's limited power to attach conditions to the acceptance of an application corroborates that limited role. See Cox, supra.

Those charges and considerations are separate and distinct from the charges and considerations that a Mayor and Member of the Governing Body are required to uphold. Yet the MLUL and our law expects that the Mayor and Governing Body member will be able to hear and decide planning board matters which include those separate considerations in a fair and impartial manner. When the Legislature structured the MLUL to provide for the Board's membership to include the Mayor and Governing Body Member, it sanctioned the overlap in the functions and charge that those officials performed for each body. It not only allowed dual functions, but it acknowledged that such a structure was beneficial and in the public interest.

In this Courts view, the Mayor and Governing Body Members' prior involvement as members of the Township Committee do not and should not disqualify them from acting impartially as Planning Board members to judge the Defendant's application based upon the Township's Ordinance and sound planning principles. In fact, their duties as elected officials expect and require them to be able to make those separate decisions based upon their charge as members of the Township Committee on one hand and statutory and sworn members of the Board on the other. The facts in this case do not present a case where dual office holding were incapable and therefore caused a conflict. Reilly v. Ozzard, supra. In fact, that common law standard is not applicable when there is a statutory provision that authorizes the dual responsibility. Jones v. MacDonald, 33 N.J. 132, 134-135 (1960). In fact, Plaintiffs' argument would prevent Class I and Class III Members from participating in numerous planning board matters that the MLUL clearly authorizes. For example, under the MLUL, a zoning ordinance introduced by a governing body must be referred to the planning board for consistency review prior to final adoption. N.J.S.A. 40:55D-26, 64. Also, a planning board provides a "courtesy review" to a municipality's development project for master plans consistency. N.J.S.A. 40:55D-31(a). Surely the Legislature understood that Class I and Class III Members would be

participants in the review of the Township Committee and the Planning Board. See also N.J.S.A. 40:12A-1, et seq. and the interplay between the governing body and planning board in that context as well.

Plaintiffs' argument seeks to turn the MLUL on its head. The MLUL provides for the composition of a Municipal Planning Board. Both the mayor and a member of the governing body must be voting members of the Planning Board. N.J.S.A. 40:55D-23. Thus, by law Mayor Tipton and Councilman Cornely sat on the Planning Board at the time of the Application. If, as Plaintiffs contend, the Mayor and Councilman were conflicted out of deciding the Application because it partially involves land leased from the Township with the approval of the Township's governing body, this MLUL provision would be subject to challenge at any time a Board approves the development of municipal land or votes on an application that has been before the governing body in another context, such as the approval of a redevelopment agreement. Yet that scenario, or a scenario that is substantially similar, happens on a regular basis and it is not, as Plaintiffs offer, a unique circumstance that would be confined to this particular case.

The Plaintiffs cite to Sokolinski v. Municipal Council of Woodbridge, 192 N.J. Super. 101 (App. Div. 1983) where the court entertained a declaration judgment suit to determine whether three members and two alternate members of the Woodbridge Board of Adjustment are disqualified from hearing variance applications for property owned by the Board of Education. The Appellate Division affirmed the trial judge's finding that all five had conflicts of interest and thus none could participate in the variance proceeding.

In reaching its holding, the court recognized that it is understandable that a board member is inclined to favor increasing public revenues to contain taxes. As such, that aspect of a board member's interest should not be considered a conflict. That conflict "is tolerated because it inheres whenever a variance is sought that would increase public revenues." It is only when the applicant is the member's employer that an additional conflict occurs which was avoidable and found by that court to be unacceptable.

In the Court's view, the finding that the court made on the specific facts that were present in Sokolinski should not be extended the facts and circumstances of this case.

First, to characterize the Mayor and Committeeman as employees of the Township is misleading. Both are elected officials who earn their living as employees for other companies or organizations. While they both may receive a small stipend for their duties as the Mayor and Committeeman, in essence both are elected officials who have sworn an oath to uphold the

United States and State of New Jersey Constitutions and the law as part of their public duty. Their primary duty with regards to the Township is that of an elected public servant and not an employee. Mayors and Committeemen in New Jersey have been able to receive limited compensation since the Legislature authorized such payments in 1971. PL 1971, c 200; See N.J.S.A. 40A:9-165. In this Court's experience, most, if not all Mayors and Committeemen are paid limited stipends for their time and service. Even if those salaries were of any conceivable consequence, there is absolutely no reason to believe the Township could not pay their salaries without the revenue from the lease.

Second, the Mayor and Committeeman are explicitly required by the statutory scheme that is embedded in the MLUL to serve as members of the Planning Board. N.J.S.A. 40:55D-23 requires that the Mayor serve as a Class I Member of the Board. The organization statute also requires that a member of the governing body also be appointed to comprise one of the Board's members. When the Legislature created that mix of members, it surely recognized that there would be instances in which the municipality itself had an interest, stake or position with regards to matters that would come before the Board. Yet the Legislature did not limit participation of a Mayor or Committeeman in such instances, even though it could have easily done so.

By requiring a Mayor and Governing Body Member to be a part of the Board, it recognized that the participation of members of the Executive and Legislative Branches of the Municipal Body provide a valid and important prospective that should be part of the Board's decision making. In the Court's view, the statutory scheme buttresses the proposition that the Class I and III Members are expected and able to analyze and consider the public interest in light of the dual roles that our Legislature has mandated them to hold.

Third, the Sokolinski case which is relied upon by the Plaintiffs is distinguishable in that the board members were full time employees of the Board of Education. The Board of Education is a separate and distinct body established by a completely different statutory scheme in Title 18A. The Legislature did not recognize or create an interrelationship between the MLUL and Title 18A, even though presumably it could have done so.

Fourth, Plaintiffs attempt to argue that Tipton and Cornely stand to gain a political benefit from the Approval, resulting in a conflict. The Court rejects that argument. Taken to its logical end, courts would be tasked with reviewing all municipal actions for potential political benefit – which would likely mean that the end of elected representative local government. It would also prevent Class I and Class III Members from voting on any planning board matter

involving any governing body action, because of the potential benefit due to popularity of the action. In fact, if Mayor and Committeemen tout the action taken in their future campaigns it likely simply confirms their belief, as elected officials, that they have promoted actions that are in the public interest.

The Court does note that the Defendants propose that the mayor and councilman, as Local Government Officers, are governed by applicable provisions of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 *et seq.* ("LGEL"). The LGEL governs the standards by which local officials, both elected and employed, must discharge their duties. It prohibits officials and employees from engaging in business or professional activities which conflict with their duties and prohibits self-dealing in the award of government contracts, among other provisions. In fact, the Defendants submit that the LGEL contains a provision which directly applies here:

> No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group.

N.J.S.A. 40A:9-22.5(i).

In other words, the Defendants argue that N.J.S.A. 40A:9-22.5(i) contemplates exactly the type of situation where a member of a governing body must vote on a matter that may appear to benefit him or her as an elected official but does not actually result in any material or financial gain to the member or a close relative. The Defendants therefore submit that this provision is squarely on point.

While the Court finds that for other reasons Mayor Tipton and Committeeman Cornely were not in conflict, the Court does not rest its opinion on the provisions of N.J.S.A. 40A:9-22.1, et seq. In the Court's view, N.J.S.A. 40A:9-22.5(i) is not applicable here as it only refers to legislative actions such as enactments that they may have participated in, but the section does not refer to quasi-judicial actions such as the one here. South Brunswick Associates v. Township Council of the Twp. of Monroe, 285 N.J. Super. 377, 380 (Law Div. 1994).

Even though the Court has not relied upon that statutory provision cited by the Defendants, the Court's ultimate finding is guided by the instructions and lessons found in Wyzykowski v. Rizas, 132 N.J. 509, 511 (1993), in which the Supreme Court noted:

> we have reservations that the opinion below may have been overbroad insofar as it suggests that the appointive status of planning board members might automatically create a "personal or financial interest" sufficient to disqualify them from acting in matters involving the mayor . . . .

There, plaintiffs challenged a planning board's decision approving a site plan application filed by the town's then-mayor. The Plaintiffs claimed that certain board members' appointments by the mayor created a "personal or financial interest" such that those members could not hear the application. The Court disagreed:

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials . . . A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. at 523-24.

The officials here share the same interest as the public in approving the Application, and Plaintiffs have not even attempted to demonstrate the contrary. The officials derive no personal benefit from the approval of the Application - they share only in the purported "windfall" received by the Township when and if the Township allows the lease to proceed. The officials receive no payments and no special benefits related to the transaction. As citizens of the Township, they receive the benefit of only an expanded tax base as they would from any commercial development. This is a benefit they share with the entire Township (including Plaintiffs). Plaintiffs' insinuation that there is somehow corruption in the approval process because the officials receive a benefit which they themselves are receiving is unwarranted and unsupported, in the Court's view.

For all of these reasons, the Court finds that under the facts and circumstances in this case, neither the Mayor nor the Committeeman had a conflicting interest that could be said to interfere with their impartial performance of duties as members of the Harmony Township Planning Board. Wyzykowski v. Rivas, 132 N.J. 509, 523 (1993). That finding applies to any alleged conflict under the Local Government Ethics Law, the MLUL and the common law. For these reasons, the Court rejects the Plaintiffs' position. As such, that aspect of the Plaintiff's request for relief is DENIED.

C. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE HPS FAILED TO ADDUCE THE PROOFS NECESSARY FOR THE REQUIRED "D" VARIANCE RELIEF?

As a result of the Court's findings outlined above, the Court is left with the usual claims that are raised in the Prerogative Writ Actions including whether the applicant presented proofs necessary for the requested variances. The Court is reminded of the well-established principle that courts will not overturn a Land Use Board's decision unless it is be arbitrary, capricious, or unreasonable. Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 546 (2018). Plaintiffs carry the burden of proof on that point. See Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013) ("[W]e acknowledge the wide latitude accorded to a municipal planning board in the exercise of its delegated discretion. A board's decisions are presumptively valid, and a court may not substitute its own judgment for that of the board unless there has been a clear abuse of discretion by the board."); Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193, 199 (App. Div., 2011) (same). For the reasons set forth below, the Court finds that the Plaintiffs cannot meet that burden of proof.

1. Did HPS fail to apply for and obtain the d(1) use variance required for the proposed electrical substation?

In addition to a number of other improvements, HPS's application proposed the construction of an electrical substation in order to facilitate the transmission of the electrical power generated by the thousands of individual solar arrays planned for the 600-acre assemblage. Plaintiffs posit that none of the underlying zoning districts permit "electrical substations" either as a principal or conditional use. As a result of those circumstances, the Plaintiffs submit that HPS's application therefore required a use variance pursuant to N.J.S.A. 40:55D-70.d(1) and the failure to have obtained the same requires the invalidation of the Resolution and all approvals memorialized thereby, as a matter of law.

When it comes to a review of the applicable sections of the Township's Zoning Ordinance, it is well-established that the "rules of statutory construction govern the interpretation of a municipal ordinance." State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) (citing AMN, Inc. v. Township of S. Brunswick Rent Leveling Bd., 93 N.J. 518, 524-25 (1983) (citing Camarco v. City of Orange, 61 N.J. 463, 466 (1972)); Norman J. Singer, Sutherland Statutory Construction § 30.06 (5th ed. 1992)). This analysis necessarily begins with the subject provision's plain language. New Jersey Shore Builders Ass'n v. Township of Jackson, 401 N.J.

Super. 152, 162 (App. Div. 2008). If unambiguous, courts must afford the plain language its ordinary meaning, particularly when the drafters have chosen to utilize and include specific words and phrases in favor of more general ones. Id. (citing City Council of Orange Twp. v. Brown, 249 N.J. Super. 185, 191 (App. Div. 1991); Lewis v. Bd. of Trs., Pub. Employees' Retirement Sys., 366 N.J. Super. 411, 416 (App. Div.), certif. denied, 180 N.J. 357 (2004)); Essex County Retail Liquor Stores Assoc. v. Municipal Board of Alcoholic Beverage Control, 77 N.J. Super. 70, 77 (App. Div. 1962).

With zoning ordinances, when only specific uses are enumerated generally, "the presumed legislative intent is that only those uses are to be deemed permitted." Cox & Koenig, New Jersey Zoning and Land Use Administration, § 26-2.3 at p. 581 (Gann 2021) (citing Financial Services, LLC v. Zoning Bd. of Adj, of Borough of Little Ferry, 326 N.J. Super. 265, 274-275 (App. Div. 1999); Atlantic Container, Inc. v. Township of Eagleswood Planning Bd., 321 N.J. Super. 261, 274-275 (App. Div. 1999); Sun Co., Inc. v. Zoning Bd. of Adj. of Borough of Avalon, 286 N.J. Super. 440 (App.Div.), certif. den., 144 N.J. 376 (1996); L.I.M.A. Partners v. Northvale, 219 N.J. Super. 512 (App. Div. 1987); State v. Farmland-Fair Lawn Dairies, Inc., 70 N.J. Super. 19, 23 (App. Div. 1961), certif. den., 38 N.J. 301 (1962)). In fact, it is well-established that the exclusion of certain uses from a zoning district is "a matter within the sound discretion of the municipal legislative body." Atlantic Container, 321 N.J. Super. at 274 (citing Franklin Contracting Co. v. Deter, 99 N.J.L. 22, 24-25 (Sup. Ct. 1923)). In this same vein, a municipality may distinguish among uses of the same type "and may permit one and prohibit the other." Id. (citing Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 515 (1949); H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 31 N.J. Super. 30, 33 (App.Div.1954); Newark Milk & Cream Co. v. Parsippany-Troy Hills Tp., 47 N.J. Super. 306, 328 (Law Div.1957)).

Plaintiffs argue that when the Court reconciles the foregoing principles with the facts in the instant case, the Court should find that HPS failed to apply for, and the Board did not grant, a necessary d(1) use variance. By way of explanation, Plaintiffs note that HPS's application proposed the development of, inter alia, an electrical substation on Block 38, Lot 2. Plaintiffs submit that the Zoning Ordinance does not include electrical substations amongst the permitted principal or conditional uses in the AR-250 Zoning District, the LI-O Zoning District or the I-1 Zoning District. (P-9). Moreover, Zoning Ordinance Section 165-8.A confirms that all "[u]ses not specifically permitted are prohibited."

Plaintiffs point out that HPS's application to the Board sought approval only for a "solar production system". Zoning Ordinance Section 165-4.B defines a "solar production system" as "[a] solar energy system, as defined herein, that is used to generate electricity." Plaintiffs theorize that to understand the definition of "solar production system" and what that term specifically contemplates, reference must be made to the definition of "solar energy system". In fact, Plaintiffs note that the Zoning Ordinance Section 165-4.B defines a "solar energy system" as "[a] solar energy system, as defined herein, that is used to generate electricity."

According to the Plaintiffs, the Zoning Ordinance's definitions confirm that neither a "solar production system" nor a "solar energy system" includes an electrical substation. Additional support for this analysis exists in the conditional use standards applicable to "solar production systems". To be clear, Zoning Ordinance Section 165-45.1(D)(1) specifically permits "ground-mounted solar arrays for solar production systems". Plaintiffs offer that it is significant that the Zoning Ordinance Section 165-4.B precisely defines "ground-mounted solar array" as "[a] solar energy system, as defined herein, that is mounted on the armatures anchored to the ground with ground cover beneath." Again, Plaintiffs point out that this term includes no mention of or reference to an electrical substation however which, in Plaintiffs' view, makes that aspect of the application non-conforming so that a Use Variance is required.

In sum, Plaintiffs argue that the Zoning Ordinance does not permit electrical substations, either as a principal use or as a conditional use in the AR-250 Zoning District, the LI-O Zoning District or the I-1 Zoning District. Plaintiff offers that the Zoning Ordinance further makes clear that all uses which are not specifically permitted are deemed to be prohibited. Plaintiff indicates that HPS's proposed development which included an electrical substation therefore required a d(1) use variance. Plaintiff asserts that HPS failed to adduce the necessary proofs to justify such relief. Moreover, even assuming, arguendo, that HPS had adduced such proofs, Plaintiff contends that the Board was not jurisdictionally configured to grant a d(1) use variance when it considered HPS's application. The participation of the Board's Class I and Class III members prevented the same. See N.J.S.A. 40:55D-25.c. For those reasons as well, Plaintiffs ask the Court to invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

D(1) use variance relief is required for uses that are not permitted under the applicable zoning ordinance. See N.J.S.A. 40:55D-70(d)(1). Here, in the Court's view, the plain meaning of Harmony Township's Zoning Ordinance unequivocally permits electrical substations as a part of

a solar production system, and, in this regard, does not consider the substation to be a separate use.

In interpreting ordinances, the goal of the Court is to determine the legislative intent, along the same lines as in construing statutes and other legislation. See Atl. Container Inc. v. Twp. of Eagleswood Planning Bd., 321 N.J. Super. 261, 269 (App. Div. 1999). Zoning ordinances must be given a reasonable construction, and legislative intent is to be determined from the language used. See Colts Run Civic Ass'n v. Colts Neck Tp. Zoning Bd. of Adj., 315 N.J. Super. 240, 247 (Law. Div. 1998). Indeed, the Court is to be guided by the plain language of the Zoning Ordinance:

> Ordinances are to receive a reasonable construction and application, to serve the apparent legislative purpose. We will not depart from the plain meaning of language which is free of ambiguity, for an ordinance must be construed according to the ordinary meaning of its words and phrases. These are to be taken in the ordinary or popular sense, unless it plainly appears they are used in a different sense.

Essex Co. Retail Liquor Stores Ass'n v. Mun. Bd. of Alcoholic Beverage Control City of Newark, 77 N.J. Super. 70, 77 (App. Div. 1962) (citing Sexton v. Bates, 17 N.J. Super. 246, 253 et seq. (Law. Div. 1951) aff'd on opinion below, 21 N.J. Super. 329 (App. Div. 1952); 6 McQuillan, Municipal Corporations (3rd ed. 1949), paragraph 20, 47, P.114; cf. R.S. 1:1-1).

In the Court's view, a reasonable construction of the unambiguous phrasing in the Zoning Ordinance can yield only that the conclusion that an electrical substation is an integral component of the solar energy system, which is expressly permitted. Therefore, no use variance relief is required.

Section 165-45 of the Zoning Ordinance expressly permits "solar production systems" as a conditionally permitted use. Solar production systems are defined under § 165-4.B of the Zoning Ordinance as "a solar energy system . . . that is used to generate electricity." See Section 165-45 (emphasis added). The electrical substation is unquestionably part of a solar production system. Had the drafters of the Zoning Ordinance intended otherwise, they would not have defined the use to include the word "system", which has a common dictionary definition of "a set or things working together as parts of a mechanism or an interconnecting network."[9] An electrical substation is a critical component of a solar production system because it provides for

[9] See Google's English Dictionary, provided by Oxford Languages. See also Merriam-Webster.com 2021 definition of system as "a regularly interacting or interdependent group of items forming a unified whole … such as … a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose." http://www.merriam-webster.com (22 Dec. 2011)

the interconnection to the distribution system, and to construct a utility-scale 70- megawatt production system with no means of distribution would be nonsensical. Had the drafters of this provision in the Zoning Ordinance intended to separately regulate the component parts of a solar production system - such as solar panels or substations – they would have done so. The term “solar panel” is separately defined under the Zoning Ordinance but is not called out anywhere as a separate or distinct use, because it is an integral component of a solar production system.

There are numerous instances under the Zoning Ordinance and specifically in the provisions governing solar production systems where it is clear that solar production systems were intended to include electrical substations. For example, section 165-45.1, B.6 which sets forth the objectives for solar production systems, provides that one of the purposes and objectives is to "enhance the ability of the providers of commercial solar energy to provide such services to the community effectively and efficiently." In order to provide energy services to the community, there is a clear presumption that the power produced needs to connect to the power grid. In order to accomplish this, the voltage typically has to be changed from the voltage that is used at the project level and in order to accomplish this, it requires a transformer and an assortment of switches and protection equipment to connect to the grid, which is accomplished through a substation.

Likewise, Section 165-45.1.D.6 of the Zoning Ordinance, which sets forth the bulk and use requirements for solar production systems, provides that "all ground-mounted solar production systems shall be set back a distance of 75 feet from all property lines and street right-of-way lines and within which no solar panels, inverters, interconnection equipment or other devices or facilities related to the use shall be located." This provision directly addresses interconnection equipment and other devices and facilities (including substations and switching stations), thus clearly signaling and indicating that these components are a part of the solar production system, and not separate and distinct uses.

In addition, there are several references under the design standards for solar production systems set forth under section 165-45.E of the Zoning Ordinance that make clear that substations are considered a part of the solar production system. By way of example, Section 165-45.1.E.3 provides that "wires, cables and transmission lines running between the facility and any other structure shall be installed underground. However, interconnection services between the solar facility and the utility transmission lines may be constructed aboveground." This provision clearly anticipates an interconnection facility and allows it to be above ground, as is

necessary in order to connect to the transmission lines. Moreover, Section 165-45.1.E.6 provides that "All ground-mounted electrical and control equipment shall be labeled and secured to prevent unauthorized access." Again, this provision anticipates that there is more electrical equipment related to a solar production system than just an array of solar panels. The provisions for solar production systems concerning facility abandonment also contemplate substations as an integral part of the system. Section 165-45.1.F.1 notes that "Solar production systems and associated equipment, which have not been in use for commercial production and sale for a period of six consecutive months, shall be removed by the property owner. Additionally, all equipment buildings, related facilities, fencing, utility connections and access driveways shall be removed and the site restored to its predevelopment condition." This language captures more than just panels when referring to the "facility".

The Site Plan Review Ordinance of the Township Code governing design guidelines for utility service provides that "all electric, telephone, cable television and utility lines shall be underground. Adequate water supply, sewerage facilities and other utilities necessary for essential services to residents and occupants shall be provided." See Code § 137-11.A.5. This section anticipates that uses will need structures and buildings for utility services without requiring separate permit application or approvals for any necessary component of the use. Otherwise, nearly every use would require a separate approval to permit utility service on the property - which would not only be impractical but also completely illogical.

Aside from the numerous provisions in the Zoning Ordinance and Site Plan Ordinance acknowledging that an electrical substation is a necessary component of a solar production system as set forth above, Mr. Daniels explained the project's need to attach to the transmission system. On pg. 9 of Mr. Daniels' slide presentation, received by the Board as Exhibit A-1, he addressed access to high-voltage lines adjacent to the site, existing transmission congestion, the ideal conditions of the site and the fact that this site is not suitable for small solar because JCP&L's distribution system is overloaded. See, e.g., Tr. 75:9-78:25, HPS-11. On pg. 13 and 15 of Exhibit A-1, Mr. Daniels provided a description of the facility and the substation and the interconnection to the existing transmission lines adjacent to the site. See, e.g., Tr. 85:21-88:9. In addition, the site plan drawings submitted to the Board in connection with the application showed the substation locations and Mr. Nusser discussed the way the electricity generated is collected and transferred to the grid. See, e.g., Tr. 40:20-44:2, 117:24-119:8. HPS's testimony was undisputed. There was not a single comment within the review letter prepared by Mr. Schrek

(the Board's expert engineering consultant) or from Mr. Schrek during his testimony at the public hearing, and no questions asked by the Board that attempted in any way to distinguish the substation from the remainder of the solar production system.

The Court does note that to the extent that it could even be argued that a use variance would be required, HPS's presentation and testimony made clear even though no such relief was required that HPS's Project as a whole meets the criteria for a D(1) variance. As noted above, Mr. Nusser explained that the solar production system was an inherently beneficial use and satisfied the Sica standard. See Stmt. of Facts § C(3)(b)(1); see also Tr. 170:24-175:16.

For all of those reasons, the Court rejects the Plaintiff's position on this issue. In the Court's view, the Board reasonably and properly interpreted its local ordinance in a manner to indicate that a Use (d)(1) Variance is not required here. The Board's interpretation is neither open-ended nor improperly expansive as argued by the Plaintiff. Instead, the interpretation is supported by a reasonable interpretation of the ordinance language and clear intent.

B. Did HPS fail to satisfy the "solar production system" conditional use criteria and otherwise failed to adduce the necessary proofs for a d(3) conditional use variance?

1. Plaintiff's Arguments

Unlike an electrical substation, Plaintiffs acknowledge that a "solar production system" is permitted as a conditional use in the various zoning districts underlying HPS's 600-acre assemblage. A conditional use is use which is permitted provided that it satisfies the attendant conditional use criteria. In this case, HPS's proposed "solar production system" did not satisfy the Zoning Ordinance's attendant standards. Plaintiffs advocate that this situation dictated that HPS apply for and obtain a conditional use variance pursuant to N.J.S.A. 40:55D-70.d(3). As such, Plaintiffs urge that the Board's failure to grant such relief necessitates the invalidation of the Resolution and all approvals memorialized thereby, as a matter of law.

Through the enactment of the MLUL the Legislature expressed a clear preference for municipalities to make zoning decisions by ordinance as opposed to by variance. Price v. Himeji, 214 N.J. 263, 284 (2013) (citing Medici v. BPR Company, 107 N.J. 1, 5 (1987)). This is particularly true in the case of so-called "d" variances which, unlike site plans, subdivisions or dimensional variances, cannot be approved by a simple majority vote. Rather, the approval of a "d" variance requires an affirmative vote of at least five of the seven members of the board. N.J.S.A. 40:55D-70. In commenting upon this legislative design, courts have explained that a

"d" variance is only to be granted in exceptional circumstances. Kinderkamack Road Associates, LLC v. Mayor and Borough Council of the Borough of Oradell, 421 N.J. Super. 8, 12 (App. Div. 2011).

A d(3) conditional use variance however is a distinct category of variance type as it contemplates types of variances with the particular use is permitted, but only if the applicant can reasonably comply with certain specific legislatively created conditions.

The seminal case concerning the consideration and evaluation of d(3) conditional use variances is Coventry Square, Inc. v. Westwood Zoning Bd. of Adj., 138 N.J. 285 (1994). The Supreme Court in Coventry Square held that the demonstration of special reasons required to justify the grant of such relief differed from that applicable to a d(1) use variance. To satisfy the positive criteria for a d(3) conditional use variance the applicant must prove that:

> [T]he site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. That standard of proof will focus both the applicant's and the board's attention on the specific deviation from conditions imposed by the ordinance, and will permit the board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use. Thus, a conditional-use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems.

Id. at 298-99.

Like any variance, a d(3) conditional use variance also requires the applicant to satisfy the negative criteria, i.e., that the variance can be granted without a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. See N.J.S.A. 40:55D-70. With the first prong, the "focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance." Coventry Square, 138 N.J. at 299. The second prong, on the other hand, requires the board to determine that "the grant of the conditional-use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district." Id. at 299.

In this case, Harmony Plain's (HPS's) application sought approval to construct a "solar production system" on six different parcels situated in the AR-250 Zoning District, the LI-O Zoning District and the I-1 Zoning District. A "solar production system" is not a permitted principal use in any of these zones. Rather, a "solar production system" is only permitted as a

conditional use in these zones when it satisfies all of the attendant conditional use standards set forth in Zoning Ordinance Section 165-45.1.

At the outset of the hearing in this matter, the Board made a preliminary determination that HPS's proposed "solar production system" satisfied the conditional use criteria established by Zoning Ordinance Section 165-45.1. In so doing, the Board effectively found that HPS could therefore proceed without the necessity of d(3) variance relief. Plaintiffs argue, however, that in rendering that determination, the Board erroneously interpreted and applied the Zoning Ordinance's standards. Plaintiffs offer that, for example, the Board wrongly concluded that HPS's development proposal abided Zoning Ordinance Section 165-45.1(D)(5)'s prohibition against more than 80% of a lot being "devoted to a ground-mounted solar production system". With the exception of Block 38, Lot 2 (which included the electrical substation discussed supra), HPS proposed to devote each of the lots included in the assemblage entirely to such use and to no other. Plaintiffs submit that each of the lots included in the assemblage are 100% "devoted" to a ground-mounted solar production system, so that the 80% threshold was exceeded.

Plaintiffs point out that it is significant that the Board's professional consultant Stanley Schrek, PE, AIA, PP, CME, LEED AP, made this same observation in his January 4, 2021 review letter which stated, "Variance Required". (P-10, p. 14).

Additionally, Plaintiffs urge that the Board mistakenly found that HPS's development proposal abided Zoning Ordinance Section 165-45.1(D)(6)'s 75-foot setback requirement pertaining to, inter alia, interconnection equipment, devices and facilities related to the solar production system. The site plan submitted with the application clearly demonstrates that HPS proposes to locate such equipment, devices and facilities inside of the 75-foot setback area. Again, Mr. Schrek made this same finding in his January 4, 2021 review letter. (P-10, p. 14).

Plaintiffs also contend that further compounding the Board's erroneous affirmative determinations in this regard, the Board also failed to consider other conditional use criteria established by Zoning Ordinance Section 165-1.45.1 as well as the more general conditional use standards set forth in Zoning Ordinance Article VIII. For example, Plaintiffs aver that HPS's proposed "solar production system" violates Zoning Ordinance Section 165-45.1(E)(2)'s prohibition against facilities and associated equipment significantly impairing a scenic vista or scenic corridor as identified in Harmony Township's Master Plan. The relevant section of that document explains:

SCENIC CORRIDORS/VISTAS

> Scenic corridors contribute to the experiences of residents and visitors and help define Harmony Township as a unique place. Scenic roads and vistas are defined in terms of both the character of the roads themselves and the landscapes through which they pass. Scenic corridors provide visual and physical access to different landscapes. These roads also provide access to other scenic and cultural resources, such as scenic areas, vista points, overlooks, open spaces, recreational areas, and historic structures or historic districts and landmarks. These unique resources and features provide opportunities to understand local heritage or lifestyle, appreciate the uniqueness of the community, and participate in leisure activities.
>
> Scenic corridors are typically defined in terms of the roads affording scenic views, although the term also applies to greenways and trials for hiking, bicycling, or horseback riding. An important component of scenic corridors are the observation points along or accessed by them which offer such views. Scenic views enrich the experiences of residents, visitors, and passersby. They help define the cultural and historic, as well as aesthetic, uniqueness of the Township, and they are an integral part of its recreational amenities.
>
> In recognition of their importance, one of the objectives of the Township's planning efforts is to conserve and enhance scenic resources that reflect the natural and cultural heritage of the Township. A specific goal in that regard is to "protect areas of scenic value, especially those visible from public roads and areas that are unique, defining the character of Harmony Township.

(P-13, Conservation Element 13-14)

In this action, Plaintiffs allege that HPS's proposed utility-scale solar energy facility will impair multiple scenic corridors identified in the Conservation Element of Master Plan including Harmony Station Road, Brainards Road, Garrison Road and River Road. (P-13, Conservation Element 15-16) HPS's site plan proposes the installation of an extensive series of landscape buffers and berms to obscure the view of the thousands of individual photovoltaic panels which it intends to construct. (P-5, Sheets 35-44) Plaintiffs assert that by operation of logic, these very same features will also obscure the scenic vistas beyond, effectively creating a tunnel or wall-like effect. As such, Plaintiffs argue that this does not accord with the intent of the Master Plan to protect these viewsheds and also violates the express prohibition established by Zoning Ordinance Section 165-45.1(E)(2).

Finally, Plaintiffs complain that HPS presented no evidence relative to the impact of its development proposal on property values despite Zoning Ordinance Section 165-41.D(2) mandating the same with an application for a conditional use. Plaintiffs suggest that, at the very least, HPS should have proffered testimony from a licensed New Jersey appraiser in this regard.

Plaintiffs submit that the Board improperly required nothing, however, and completely ignored the issue.

In sum, Plaintiffs argue that HPS's nonconformance with the Zoning Ordinance's conditional use standards prohibited the Board from considering the proposal as a "by-right" application. Plaintiffs posit that this situation necessitated that HPS apply for and obtain a d(3) conditional use variance. Plaintiffs submit that HPS made only a prophylactic attempt to address the attendant proofs, this effort fell short of meeting the d(3) conditional use variance standard explained by the Supreme Court in Coventry Square. Moreover, even assuming, arguendo, that HPS had satisfied the applicable standard, Plaintiffs assert that the Board was not jurisdictionally configured to entertain a "d" variance with the Board's Class I and Class III members participating. See N.J.S.A. 40:55D-25.c. As such, Plaintiffs advocate that the Court should invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

2. Court's Analysis and Decision

(a) Regarding Mr. Schrek's Letter

Initially, however, the Court finds that Plaintiffs' assertion that Mr. Schrek's letter determined conclusively that variances were required is, in the Court's view, inaccurate. Even a cursory reading of Mr. Schrek's letter makes clear that Mr. Schrek indicated only that HPS must demonstrate compliance with certain of the conditional use criteria or seek variance relief. His letter noted two instances where a variance may potentially be required: (a) Section 165-45.1(D)(5)'s prohibition against more than 80% of a lot being devoted to a solar production system and (b) 165-45.1(D)(6)'s requirement that all ground mounted solar systems shall be set back a distance of 75 feet from all property lines and street right of way lines. See Schrek Letter, dated January 4, 2021 at pp. 14-15 (P-10).

During the initial portion of the Board meeting, Mr. Schrek and Mr. Nusser discussed in detail HPS's compliance with the conditional use criteria. Mr. Nusser's testimony made clear that HPS complied with the siting requirements for solar production systems, the minimum lot size for each megawatt of electricity, the project height limitation, and requirements relating to stormwater management and impervious coverage. See Stmt. of Facts § C(1) & C(3)(b)(2); see also Tr. 20:1-23:17, 23:21-24; 24:10-26:1; 48:2-6; and 48:7-10. Regarding the remaining two criteria, in the Court's view, the Board reviewed and made proper and appropriate interpretations of the Zoning Ordinance. As such, the Court rejects the Plaintiffs' position on the issue.

(b) Regarding the 80% Coverage Issue

First, the conditional use requirement set forth in Section 165-45.1(D)(5) provides only that "no more than 80% of a lot may be devoted to a ground-mounted solar production system." However, a review of the record supports the proposition that Plaintiffs' contention that HPS failed to comply with the criteria because, other than Block 38, Lot 2, HPS proposed to devote each of the lots included in the assemblage entirely to the solar use, is inaccurate.

In fact, Plaintiffs proffer that it completely ignores the fact that during the course of the application, HPS modified its application proposal to address concerns raised by the Board's professionals – which revisions included ensuring that each individual lot complied with the 80% requirement. In fact, Mr. Nusser testified to this fact, further noting that HPS calculated the 80% requirement conservatively, including not just the solar production system itself, but the access roads and easements. See e.g. Tr. 32:20-33:8. Further, Mr. Nusser confirmed that there was nothing associated with the proposed solar production system within the remaining 20 percent of each lot part of the Project. See Tr. 33:16-25. Mr. Nusser demonstrated such compliance by reference to an exhibit shown to the board during the hearing. See Tr. 29:20-36:25. In fact, the Exhibit clearly shows the following percentages of each lot being devoted to a solar production system as follows: Block 38, Lot 2 – 79.27%; Block 37, Lot 4 – 79.61%; Block 44, Lot 9 – 79.02%; Block 44, Lot 10 – 51.91%; Block 44, Lot 14 – 78.39%; and Block 44, Lot 23 – 64.59%. See HPS-11.

Following that testimony – and Mr. Schrek's acknowledgement that HPS complied – the only issue to be interpreted by the Board was whether the conditional use standards included an additional, unstated, requirement that not only may no more than 80% of a lot be devoted to a solar production system, the remaining 20 percent of each lot must be able to be devoted to another use. See Tr. 34:13-35:7. But during discussions on the issue, the Board relied upon the plain, unambiguous language of the ordinance (see Stmt. of Facts § C(1) & C(5), supra), which contains only the requirement that no more than 80 percent be devoted to a solar energy system, and that it is not appropriate to impose additional conditions or restrictions on the remainder of the lot. See Tr. 35:5-36:25.

In that regard, the Court rejects Plaintiffs' unsupported and illogical interpretation of the words "devoted to" in the Zoning Ordinance in issue. Taken to its logical extreme, Plaintiffs' interpretation cannot hold water.

For those reasons, the Court rejects the Plaintiffs' position that the Harmony Plains 80% coverage limitation has been violated. The Court finds that Harmony Plains did, in fact, comply with the ordinance provision so that a d(3) variance was not required.

(c) Regarding the 75-Foot Setback

Second, the conditional use requirement set forth in Section 165.45.1(D)(6) of the Zoning Ordinance that is "in issue" requires that "all ground-mounted solar production systems shall be set back a distance of 75 feet from all property lines and street right-of-way lines and within which no solar panels, inverters, interconnection equipment, or other devices or facilities relating to the use shall be located."

In the Court's view, Plaintiffs incorrectly argue that a conditional use variance was required because HPS proposed equipment, devices, and facilities within the 75-foot setback area. However, the Board Engineer determined that the Project did indeed comply with the 75-foot setback requirement, with the potential exception of electrical feeds located underground between the lots. With regards to that issue, he specifically requested the Board to interpret the Zoning Ordinance to determine whether these underground connections were subject to the 75-foot setback requirement. See Tr. 37:1-38:8; 44:3-14. In the Court's opinion, the Board correctly determined that they were not, reasoning that the Township was aware when it drafted the ordinance that any solar system would have underground wires, which would be necessary for a project of this nature to be developed. See Tr. 46:6-47:1. Though the term "setback" is not defined by either the Zoning Ordinance or the Municipal Land Use Law, it is defined in other municipal codes as "the distance between the building and any lot line";[10] "the distance between a street line or lot line and that portion of the lot where structures are located";[11] and "the distance between the street right-of-way line and the front line of a building or any other projection thereof".[12] These definitions all set forth the same concept: that a setback is to be construed as the distance between the lot line and the structures or buildings which sit on the grounds of the lot.

Though the Zoning Ordinance does not specifically define "setback," its definition of a structure is instructive because it specifically excludes from its definition "wires and their supporting poles or frames of electric or telephone utilities or other service utilities below or at

[10] Municipal Code of the City of Newark § 41:2-2
[11] Municipal Code of the Township of Millburn, § 301.57
[12] Municipal Code of the Township of Franklin, § 112-4.

ground level or their concomitant appurtenances." See § 165-4. Of course the ramification of such an interpretation is significant since underground wires and other facilities are common in all kinds of developments, including residential uses. In light of the common definition of "setback" and the Zoning Ordinance's definition of "structure," the Court finds that the Board was correct in interpreting the setback requirement to apply only to the above-ground portions of the Project. Furthermore, the design standards set forth in the code for the conditional use standards, specifically require that wires, cables, and transmission lines be installed underground. See Section 165-45.1E(3) of the Zoning Ordinance. Moreover, it is completely in accord with the Zoning Ordinance's determination of setbacks and required yards. Toward that end, the Zoning Ordinance defines front and side yards as "open, unoccupied spaces between the applicable street lines and the nearest roofed portion of a building." See 165-4. In the Court's view, that interpretation is reasonable (not to mention consistent with the land use codes of nearly all municipalities in which this Court has had experience). In fact, as if a setback or structure were to include such underground conduits, nearly any development – residential, commercial, or industrial – would require variance relief from the setback requirements, which created an analogous, undesirable and extreme result. It is also entirely consistent with the planning purposes of a setback, which is largely tied to an aesthetic component to give space and separation from structures that are visible and above-ground and to provide a buffer between lots to prevent impact from development on one property to its neighbor. See Pierce v. Board of Adjustment of Borough of Saddle River, 42 N.J. 324 (1964), and Loveladies Prop. v. Barnegat City, 60 N.J. Super. 491, 499 (App. Div. 1960) (discussing the purpose of setback requirements to provide open and unobstructed space); Damurjian v. Bd. of Adjustment of the Township of Colts Neck, 299 N.J. Super. 84, 97 (App. Div. 1997), noting that one of the purposes of a zoning ordinance is to promote desirable visual environments in the municipality.

The Court notes that the Plaintiffs have also raised an issue concerning two above-ground electrical pads which were shown on page 9 of 48 of the Applicant's plans. The pads which can be seen on sheet 9 of HSP's plan set, depict the site improvements on Block 44, Lot 14, but also shows the southerly portion of Lot 10 and the two parallel gray-shaded boxes along the boundary. (P-5, Sheet 9). According to the Plaintiffs, the above-ground electrical pads encroach inside the 75' setback line. Plaintiffs therefore argue that HPS failed to seek a d(3) variance to permit this "non-conforming condition" and, as such, the Court should find that the Board was not jurisdictionally configured to consider that issue.

However, in this case, the Applicant (HPS) has conceded that any and all above-ground facilities that were outside of the 75 foot setback line would be moved to be in compliance with the ordinance section, as part of the "resolution compliance process." In other words, the plans were in error and the pads are to be moved so variances are not required. For these reasons, notwithstanding the Plaintiffs' argument, under the circumstances a variance for the location of the electrical pad was not necessary. For the Court to reverse the Board's entire findings based upon an incidental improvement that was admittedly mistakenly located on the plans would be the height of form over structure. Effectively, in order to cure the defect, the applicant would simply submit the same plans (except by moving the pads which they have already agreed to move) and present the same application is non-sensical. The Court will not hold that the Board did not have jurisdiction over the matter due to what appears to be a scrivener's error on the plans. Since the matter is being remanded for other reasons, the Board can address this issue on the remand and confirm that the pads will be relocated on the final plans in a manner that will not trigger a variance. For those reasons, the Court rejects the Plaintiffs' position on that issue.

As no above-ground interconnection equipment, devices, and facilities were proposed within the 75-foot setback area other than electrical wires, the Court finds that Board appropriately determined that HPS complied, and, thus, no conditional use variance was necessary. See Tr. 47:23-48:1.

(d) Regarding Other Conditional Use Criteria Issues that Plaintiffs have raised

Finally, Plaintiffs' argument that the approval should be set aside because the Board failed to consider conditional use design standards should be disregarded in entirety. First and foremost, design "standards" are guidelines. They are not zoning requirements for which relief must be obtained. Nevertheless, the Board considered – and appropriately determined – that HPS met these standards. Regarding the Project's impact on scenic vistas, the Board accepted Mr. Nusser's[13] uncontroverted expert testimony that the Project would not significantly impair any scenic vista.[14] See Tr. 157:23-158:7. In the Court's view, the Board's reliance on that testimony cannot be considered to be arbitrary, capricious or unreasonable. Notably, the Board's Engineer,

[13] Mr. Nusser was Harmony Plains' Planning Consultant.

[14] A land use board is not free to reject uncontroverted expert testimony without explanation or contrary proofs. See, e.g., Acorn Montessori v. Bethlehem Twp. Planning Board, 380 N.J. Super. 216, 231 (Law Div. 2005) (holding that board arbitrarily disregarded expert testimony since there was no contrary expert testimony or lay testimony in opposition to the expert's conclusions.)

and Mr. Nusser both noted that HPS took steps to preserve views of Merrill Creek Mountain where appropriate. See Tr. 158:14-159:1.

The Plaintiffs attempt to interpret the record to mean that Mr. Nusser's testimony referred to only one particular vista (Merrill Creek Mountain) but not other "vistas" from roadways is, in the Court's view, a skewed construction of the record. In the Court's view, Mr. Nusser's testimony was meant to address other affected "vistas" as well.

In any event, Plaintiffs' argument that development of the Project would impair scenic vistas ignores that the very same set of conditional use design standards also requires that all solar production systems be screened from view of all public streets by buildings and/or a 50-foot buffer of dense evergreen plant material and/or fences, a requirement with which HPS, again complies. See Code § 165-45.1(E)(7). Clearly, when enacting the ordinance provision, the Township Committee determined that compliance with this screening requirement would not significantly impair a scenic vista or corridor. Those sections should and were read in pari materia. Certainly those more objective intent were designed to provide a measurable criteria rather than simply relying upon the purely subjective standard that is inherent in the ordinance description that the scenic vista or corridors not be substantially impaired.

Plaintiffs' argument also ignores the fact that, standing at approximately 10 feet tall (at maximum height) the solar panels proposed (and permitted here) are well within the 15-foot maximum height permitted, and would be unobstructive of any views. Surely, the Board could properly consider and find that these panels are much less obstructive of a scenic vista or corridor than other types of development and structures that could be constructed on the subject properties under the Zoning Code, including residential dwellings or agricultural buildings that could be built at a height more than triple the height of the proposed panels. Toward that end, and as noted above, the subject properties are located in the LI-O, AR-250, and I Zones, which permit principal building heights of 45 feet (LI-O) and 35 feet (AR-250 and I), respectively, and accessory building heights of 25 feet. See Code § 165, Attachment 1.

With respect to the Project's impact on property values, the Defendants indicate that Mr. Daniels testified that there would not be any negative impact on property values. See Tr. 73:23-74:1. He reached this conclusion based on his experience, having been involved with nearly a dozen solar projects throughout the State of New Jersey, and many more nationwide. See Tr. 63:23-64:17. In response to a question from a member of the public, Mr. Daniels further explained that in connection with certain of these other projects in New Jersey, experts have

reviewed the effects of solar products on property values, and have found, where, as here, if there is sufficient vegetative screening and setbacks, there is no evidence of impact to property owners. See Tr. 189:7-190:24. This testimony was unchallenged. The Board acknowledged its deference to Mr. Daniels' testimony on the issue. T. 164:22-24. The record demonstrated that the Board did give "reasonable consideration to the consideration of property values."

In the Court's view, the Board's consideration of that testimony satisfies the criteria that it "considered" the conservation of property values when it rendered its approval.

The case law Plaintiffs cite makes clear that expert testimony is not required in every instance for a board finding. See Kaufman v. Planning Bd for Warren Tp., 110 N.J. 551, 565-66 (1988). Moreover, inasmuch as (1) HPS complied with all of the conditions within the conditional use requirements as set forth more fully above – including with regard to the large setbacks and extensive vegetative screening and (2) the Project will have no negative impacts on the community including with respect to noise, traffic, water discharge (See Tr. 72:9-73:3; Tr. 162:3-164:11), HPS adequately established that there are no adverse consequences of the Project on property values of nearby properties.

For all of these reasons, the Plaintiffs' positions on these issues are rejected.

D. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE HPS FAILED TO ADDUCE THE PROOFS NECESSARY FOR THE REQUIRED "C" VARIANCE RELIEF?

Plaintiffs also aver that although the Board and HPS failed to acknowledge the "d" variances required for HPS's development proposal, such was not the case with the "c" variances implicated by the nonconforming setback and impervious coverage conditions associated with the subdivision of Block 38, Lot 2. In other words, both the Board and HPS conceded the need to obtain relief in this regard. However, Plaintiffs argue that the proofs adduced by HPS, however, failed to satisfy the applicable statutory criteria. This situation necessitates the invalidation of the Resolution and all approvals memorialized thereby, as a matter of law.

Variances not cognizable under N.J.S.A. 40:55D-70.d may be sought pursuant to N.J.S.A. 40:55D-70.c. Subsection "c(1)" and "c(2)" are respectively referred to as the "hardship" and "flexible c" variances. With an application seeking a "hardship" variance pursuant to N.J.S.A. 40:55D-70.c(1), the board must determine:

> [W]hether there has been a showing of (1) peculiar and exceptional practical difficulties to, or (2) exceptional and undue hardship upon, the applicant, arising out of (a) the exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by

> reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon.
>
> Cox & Koenig, New Jersey Zoning and Land Use Administration, § 29-2.2 at p. 626-627 (Gann 2021); see also, N.J.S.A. 40:55D-70.c(1).

On the other hand, to obtain a "flexible c" variance pursuant to N.J.S.A. 40:55D-70.c(2), the applicant must demonstrate that:

1. The application relates to a specific piece of property;

2. The variance would advance the purposes of the Municipal Land Use Law [as set forth at N.J.S.A. 40:55D-2];

3. The variance would not result in a substantial detriment to the public good;

4. The benefits of the variance would substantially outweigh any detriment; and

5. The variance would not substantially impair the intent of the zone plan and the zoning ordinance.

> Cox & Koenig, New Jersey Zoning and Land Use Administration, § 29-3.3 at p. 643 (Gann 2021) (citing Jacoby v. Englewood Cliffs Zon. Bd. of Adj., 442 N.J. Super. 450, 471 (App. Div. 2015); Wilson v. Brick Tp. Zoning Bd., 405 N.J. Super. 189, 198 (App. Div. 2009); Green Meadows at Montville, LLC v. Planning Bd. of Tp. of Montville, 329 N.J. Super. 12, 22 (App. Div. 2000); Ketcherick v. Borough of Mountain Lakes Bd. of Adj., 256 N.J. Super. 647, 657 (App. Div. 1992)).

The Legislature created the "flexible c" variance in 1984 in response to a situation brought about by previous amendments to the MLUL whereby zoning boards experienced a substantial, unanticipated rise in the level of dimensional variance applications more appropriate for a planning board's consideration. See Kaufmann v. Planning Bd. for Warren Tp., 110 N.J. 551, 559-560 (1988). The "flexible c" variance standard falls between the "c(1)" variance hardship standard and the "d" variance special reasons standard. Id. at 560-561. The grant of a "flexible c" variance "must be rooted in the purposes of zoning and planning itself and must advance the purposes of the MLUL." Id. at 562. However, since a "flexible c" variance is of "lesser moment [than a "d" variance] the c(2) variance need not be so closely confined to the general welfare. Rather, it may take its meaning from the other specific purposes of zoning set forth in the MLUL." Id. at 563. The Supreme Court has commented that the focus of a "flexible c" variance case is the resulting impact to the community, not the property owner, to wit:

> [N]o c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will not be on the characteristics of the land that, in light of the current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.

Id.

Similar to a "d" variance, both "c(1)" and "c(2)" variances require the applicant to establish the so-called twin prongs of the negative criteria: (1) that the variance can be granted without substantial detriment to the public good; and (2) that the variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. See N.J.S.A. 40:55D-70. Moreover, the "burden of proving the right to relief sought in the application rests at all times upon the applicant." Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington, 194 N.J. 223, 255 (2008)

In this case, HPS sought two (2) "c" variances in connection with the proposed subdivision of Block 38, Lot 2, which was one of the eight (8) individual properties included in the proposed development. Lot 2 comprises approximately 123 acres and is improved with a residential dwelling along with multiple accessory buildings and structures related to an operating farm. HPS's application proposed to essentially sever the 3-acre parcel underlying those improvements from the remainder of the property upon which the solar facility would then be constructed. (P-5, Sheet 5).

The first variance necessitated by this new configuration concerned the front yard setback dimension. It should be noted that no "C" variances were created or resulted from anything being constructed in connection with the solar production system. As discussed above, in connection with its application, HPS sought to subdivide Block 38, Lot 2 so as to create a separate three-acre parcel in order to preserve the existing, long-standing improvements located on that site. See Tr. 105:19-106:7. In connection with the subdivision, HPS required bulk variance relief to preserve an existing 59-foot front yard setback, whereas 75 feet is required, as well as with regard to the impervious coverage for the new lot (25.16% was proposed, whereas a 10% maximum is permitted). Tr. 104:22-105:10. Contrary to Plaintiffs' arguments, the Court finds that HPS unquestionably presented sufficient proofs in support of the variances, and the Board appropriately granted the relief. Since the Zoning Ordinance requires a 75-foot distance, HPS

simply proposed to retain the existing 59-foot condition. See Zoning Ordinance Section 165-11.E.

The second variance required to facilitate HPS's subdivision pertained to excessive impervious coverage. The Zoning Ordinance permits a maximum of 10%, the proposed 3-acre lot would include more than 25.6% coverage. Chris Nusser, PE, PP, HPS's professional consultant, explained these variances as follows:

> There are two variances associated with this that are the result of existing improvements on the property. The first is an existing non-conforming condition for the front yard setback. You can see here as indicated there's a 59-foot front yard setback currently for the dwelling and the requirement is 75 feet. The other is for the impervious coverage on the property. The standard is 10% and the proposed is 25.6. And again this is due to the attempt to preserve the existing farm structures, the barns that are on the property and allow them to remain.

(T, 79:11-19).

Nusser subsequently purported to justify the nonconforming front yard setback condition as a c(1) hardship variance:

> So it's not the result of anything new being constructed on this property. It's the lot got smaller around it and we're trying to maintain those – those barns. The (indiscernible) a little bit of planning on you now, we we'll summarize it back at the end, but the relief for the front yard is a clear hardship C1 variance. It's due to the existing location of the house. The house has been in that location as I mentioned for longer than probably all of us have been alive. So the only way to rectify the situation would be to remove the house and certainly, that's a detriment to the community. We can't move the house, so we have a hardship due to that.

(T, 79:20 – 80:8).

Plaintiffs argue that Nusser's argument confused the applicable standard. Specifically, Plaintiffs submit that although he rationalized the variance based on the location of the existing structure, N.J.S.A. 40:55D-70.c(1)(c) only pertains to "structures lawfully existing" on the property. But Plaintiffs complain that neither Nusser nor any of HPS's other witnesses provided any evidence confirming the lawful existence of the structure on Lot 2. Plaintiffs offer, for example, that no testimony was given in regard to the exact age of the structure, the zoning controls which existed at the time of the structure's construction and whether a building permit had been appropriately issued. Plaintiffs therefore advocate that Nusser's contention that a basis existed for a c(1) variance was therefore tantamount to a net opinion.

Plaintiffs also contend that Nusser's argument in regard to the proposed nonconforming impervious coverage condition was similarly unavailing. In relevant part, he explained:

> We could comply by removing all of the structures on the property, we could remove the barns, we could remove everything associated with it. However, we feel it promotes a desirable visual environment by allowing these farm structures to remain, and to allow these buildings which have existed again since, at least some of them since at least 1930 to remain on the property.

(T, 80:11-18).

In a C(1) variance, an applicant must establish that by reason of: (a) exceptional narrowness, shallowness or shape of a specific piece of property, or; (b) exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or; (c) an extraordinary situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 of this act (40:55D-62 et seq.) would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the applicant. See N.J.S.A. 40:55D-70(c)(1).

If hardship is proven, the applicant must also show that such relief from the zoning ordinance will not be substantially detrimental to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance (i.e., the negative criteria). See N.J.S.A. 40:55D-70.

In connection with this relief to maintain the existing front yard setback, Mr. Nusser testified that the existing farmhouse and other structures located on the lot to be created had been in existence for many years. See, e.g., Tr. 104:5-21, 105:23-106:2, 106:15-21. In fact, he testified that the structures "existed … since … at least 1930." T80:16-17. He also stated that the house was in the subject location "for longer than probably all of us have been alive." T80:1-4.[15] The only way to rectify the existing condition would be to demolish the existing structures, which, in his opinion, was a detriment to the community, and it would be a hardship because the applicant cannot move the structures. See Tr. 105:20-106:7.

Plaintiffs' arguments do not seem to question that the applicant demonstrated that strict application of the zoning ordinance would result in a hardship, only that HPS needed to

[15] Although Plaintiffs indicate that the MLUL was passed in 1975, that there was prior iterations of the MLUL so that there has been no definitive showing that the structures pre-existed those statutes which may have authorized the passage of earlier zoning ordinances in Harmony Township. Zoning regulations were only authorized by the United States Supreme Court in Village of Euclid v. Amber Realty, 272 U.S. 365 (1926). The Plaintiffs' argument ignores that the first zoning statutes in New Jersey were not passed until 1953 which was the predecessor to the MLUL. In any event, even if the Board accepted the testimony concerning the structure's existence in 193-, it would have clearly predated any local zoning ordinance.

demonstrate that the structures on site were lawfully existing. This argument fails to account for the fact that the Board, as a quasi-judicial body, and one that is thoroughly familiar with the local conditions of the community, was entitled to rely on its extensive knowledge of local conditions and history to conclude that the structures were constructed well in advance of the adoption of the Township's Zoning Code, and therefore, legally existing. See, e.g., Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 561 (App. Div. 2004) (noting the thorough familiarity that local officials have with their communities' characteristics and interests); Sica at 167 (zoning boards "possess special knowledge of local conditions"); Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201-203 (App. Div. 1960) (board can properly take judicial notice of certain matters and to rely upon the general information and experience of its individual board members); Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990) (board members have a "peculiar knowledge of local conditions" and as such must be allowed wide latitude in the exercise of its delegated discretion). Mr. Nusser explained to the Board that the structures had been existing on the property for a significant period of time, indeed, probably longer than any of the board members had been alive. See, e.g., Tr. 105:23-106:2. Mr. Nusser's testimony as to the age and significance of maintaining the existing structures was uncontroverted. The record indicates that the Board did not even question the proposition. Moreover, the Tax Records maintained by Harmony Township conclusively demonstrate that the structures on the property were constructed in or around 1850 (undoubtedly significantly longer than anyone participating in the hearing had been alive, as Mr. Nusser suggested) and prior to adoption of the Township's Zoning Ordinance in or around 1979, again many years later. See attached HPS-9 and 10. In the Court's view, the record supports the Board's implicit decision that the structures are lawfully pre-existing.[16]

1. C-2 Variance Relief Regarding Impervious Coverage

According to Plaintiffs, Nusser's contention presented a "false choice." Plaintiffs indicate that although he argued that the alternative to granting the impervious coverage variance was demolishing the existing structures, the need for relief could be avoided entirely by slightly adjusting the proposed subdivision line. By way of explanation, Lot 2 comprises approximately 123 acres. HPS's application proposed to create two lots comprising 120 acres and 3 acres respectively. Plaintiffs state that neither Nusser nor any of HPS's other witnesses provided an

[16] The Court will address the negative criteria aspect of that variance in Section "B" below.

explanation for this particular apportionment between the properties. In fact, Plaintiffs note that the impervious coverage variance could be eliminated by allocating slightly more acreage to the smaller lot. Plaintiffs suggest that a variance permitting excessive impervious coverage in this situation does not provide a better zoning and planning alternative for the community. See Kaufmann, supra, 110 N.J. at 563.

Plaintiffs also criticize that Nusser also purported to address the negative criteria attendant to the two requested "c" variances when he testified. In relevant part, he explained:

> There's no negative impacts in my opinion from the grant [of] any relief, because these are existing features on the property. The negative impacts that could come from increased impervious coverage, won't be realized and there's no additional runoff associated with these – with this impervious surface, it already exists.
>
> The property most impacted by the relief is property that the applicant is subdividing this from and only onto himself. So in sum total is not really negative impact or there is no negative impacts as a result of any grant of a variance here, and simply benefits to allow these existing farm structures, which have been a part of the community for many years.

(T, 80:19 – 81:8).

While Plaintiffs concede that Nusser arguably addressed the first prong of the negative criteria, Plaintiffs claim that he made no attempt whatsoever to address the second. Specifically, Plaintiffs indicate that he failed to analyze the impact of the requested variances upon Harmony Township's zone plan and zoning ordinance. As the applicant, HPS possessed the burden of proof to demonstrate an entitlement to relief. See Toll Bros., Inc., supra, 194 N.J. at 255. Plaintiffs therefore posit that by ignoring a fundamental component of the variance criteria, HPS plainly did not carry that burden. Accordingly, and in light of the other deficiencies with HPS's variance proofs discussed supra, Plaintiffs submit that the Court should invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

In this circumstance, Harmony Plains asserts that it has met the requirements of a C-2 Variance. A "C-2" variance is generally called a "flexible C" variance. For a "C-2" variance to be obtained, (see 40:55D-70(c)(2)), an applicant need not establish proof of hardship. An applicant must demonstrate the following:

> (1) An applicant must show that the purposes of the MLUL (40:55D-2) would be advanced by a deviation from the zoning ordinance requirement and (2) that the variance can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance (negative criteria).

See N.J.S.A. 40:55D-70(c)(2).

Again, in the Court's view, HPS presented sufficient proofs to sustain granting the variance relating to impervious coverage under the c(2) criteria. Regarding the positive criteria in support of this variance, Mr. Nusser explained that the reason for the variance was to permit the long-standing existing structures to remain so that they could be preserved and to further a desirable visual environment. See Tr. 106:8-21. Mr. Nusser testified that the applicant could remove the barns from the Property, but that it felt they "promot[e] a desirable visual environment." T 80:9-18. He also noted that "[t]he negative impacts that could come from increased impervious coverage, won't be realized and there's no additional runoff associated with . . . this impervious surface [as] it already exists." T 80:19-25. In the Resolution, the Board referenced Nusser's testimony that "preserving the existing structure promoted a desirable visual environment by allowing the longstanding structures to remain and that there would be no negative impacts in connection with the granting of the relief." P-11 at 6. The promotion of a desirable visual environment advances purpose "I" of the Municipal Land Use Law, which is to "promote a desirable visual environment through creative development techniques and good civic design and arrangement." Mr. Nusser also alluded to the benefits that allowing the structures to remain would have on the community, purpose (a) of the MLUL. See N.J.S.A. 40;55D-2(a) ("to encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare"). Mr. Nusser also testified that the project as a whole would also promote purposes (a) and (n) of the MLUL, purpose n being the promotion of the utilization of renewable energy resources.[17] The Board's acceptance of that testimony was entirely proper.

In the Court's view, the requested relief to preserve long standing community structures did not serve to benefit only the applicant. It furthered planning purposes and represented a significantly better alternative for the property than demolishing the structures that the Board properly and appropriate found was entirely consistent with both the MLUL and Harmony's Zoning Ordinance. See Kaufmann v. Planning Bd for Warren Tp., 110 N.J. 551, 564 (1988) (noting with regard to the c(2) criteria that "the board should seek . . . to effectuate the goals of the community as expressed through its zoning and planning ordinances"). Plaintiffs' reliance on Kaufmann for the suggestion that an applicant must adjust proposed lot lines in order to mitigate any need for a variance is entirely misplaced, as the case does not stand for that proposition. In

[17] The Board could have granted the relief for the existing pre-existing non-conforming setback under the "flexible c" criteria for the same reasons.

fact, here, HPS could have forgone the need for any bulk variance relief at all, and, in fact, increased the size of the footprint of the solar production system, but chose not to do so for the sake of preserving farm buildings that existed on the property for over 150 years since there is no practical means to move them. The subdivision lines drawn were the minimum necessary to carve out and protect the existing uses while still enabling sufficient use of the remainder of the property for the proposed development without triggering the need for additional variance relief. In the Court's view, the Board's decision to accept Harmony Plains' proposal in that regard was proper and appropriate.

With regard to the negative criteria, Mr. Nusser explained that there would be no negative impacts associated with granting the either the (c)(1) setback variance or the (c)(2) impervious coverage relief - i.e. there would be no detriment to the public good and would result in no impairment of the zone plan or zoning ordinance. See Tr. 106:22-107:16. Mr. Nusser explained that relief was being sought for existing features of the property – i.e. a preexisting non-conforming setback, and already present impervious coverage. See Tr. 106:22-24. As to the impervious coverage, he made entirely clear that the negative impacts that could occur from increased impervious coverage would not be realized here because the areas of impervious coverage are already there and would affect only the property that the applicant was seeking to subdivide onto itself. See Tr. 106:25-107:8. In fact, he concluded, in his opinion as a professional planner, that in addition to the lack of negative consequences on the community, zone plan and zoning ordinance, granting the variances would only serve to benefit the community by allowing the structures, which have been a part of the community for many years to remain. Id.

In the Court's view, based on this uncontroverted expert testimony, the Board's granting of the relief requested was entirely appropriate and should be sustained. A C(2) variance stands if, after adequate proofs are presented, the board without arbitrariness concludes that the harms, if any, are substantially outweighed by the benefits. See Kaufmann, 110 N.J. at 565. Even if Mr. Nusser's testimony failed to recite certain "magic words," the Court in Kaufmann, specifically noted that that the planner did not recite the weighing process is not fatal to the decision and that "expert testimony is not required in all instances to sustain a board finding," where the applicable variance criteria was met. See 110 N.J. at 565-66. There are ample facts in the record to support the Board's conclusion in the Court's view.

For these reasons, the Court will therefore dismiss Count V of the Plaintiff's Complaint.

E. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE HPS'S PRE-HEARING NOTICE WAS DEFICIENT THEREBY RENDERING THE BOARD WITHOUT JURISDICTION TO CONSIDER THE APPLICATION

Plaintiffs also advocate that the Pre-Hearing Notice issued by Harmony Plains in this matter was deficient so that the Court should invalidate the approval issued by the Board. Plaintiffs assert that with certain limited exceptions, the MLUL requires a developer to publish and serve notice of a development application at least ten days in advance of a scheduled hearing. N.J.S.A. 40:55D-12. The MLUL further mandates that such notice include certain specific information including:

> [T]he date, the time and place of the hearing, the nature of the matters to be considered and….an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers….and the location and times at which any maps and documents for which approval is sought are available[.]

N.J.S.A. 40:55D-11.

It is well-established that public notice of a hearing regarding an application for development shall (1) provide the date, time and place of the hearing, (2) identify the property proposed for development, (3) provide the nature of the matters to be considered and (4) indicate the location and time at which supporting documents are available for review. N.J.S.A. 40:55D11; Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 138 (2013).

The requirement for a description of "the nature of the matters to be considered" serves to "ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing or, at the least, look more closely at the plans and other documents on file." Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 237-238 (App. Div. 1996) (citing Scerbo v. Orange Bd. of Adj., 121 N.J. Super. 378, 389 (Law Div. 1972); Drum v. Fresno County Dep't of Public Works, 144 Cal.App.3d 777, 782-83, 192 Cal Rptr. 782, 786 (Ct.App. 1983); Shrobar v. Jensen, 158 Conn. 202, 207, 257 A.2d 806, 809 (Sup.Ct.1969); Lunt v. Zoning Board of Appeals, 150 Conn. 532, 537, 191 A.2d 553, 556 (1963); Appeal of Booz, 111 Pa.Commw. 330, 335, 336, 533 A.2d 1096, 1098 (1987)). The applicant must draft the notice in a manner which allows a layman to understand the basic concept of the proposed development. Id. at 238 (citing Holly Development,

Inc. v. Board of County Comm'rs, 140 Colo. 95, 101, 342 P.2d 1032, 1036 (1959); United Citizens of Mount Vernon v. Zoning Bd. of Appeals, 109 Misc.2d 1080, 1086, 441 N.Y.S.2d 626, 630 (Sup.Ct. 1981), appeal dismissed by 60 N.Y.2d 551, 467 N.Y.S.2d 1025, 454 N.E.2d 126 (1983)). Not surprisingly, "the critical element of such notice has consistently found to be an accurate description of what the property will be used for under the application." Id. (citing Scerbo, supra, 121 N.J. Super. at 388).

It is well-settled that proper notice is a jurisdictional prerequisite to a board's consideration of a development application. See Perlmart, supra 295 N.J. Super. at 237 (citing Brower Dev. Corp. v. Planning Bd., 255 N.J. Super. 262, 269 (App. Div. 1992)); see also, Oliva v. City of Garfield, 1 N.J. 184, 190-91 (1948); Schumacher v. Union City, 9 N.J. Misc. 492, 495 (Sup.Ct. 1931). A defective notice divests the board of jurisdiction, thereby rendering all action thereafter taken by the board null and void. See Virginia Construction Corp. v. Fairman, 39 N.J. 61, 70 (1962); Stafford v. Stafford Zoning Bd., 299 N.J. Super. 188, 196 (App. Div. 1997), aff'd 154 N.J. 62 (1998); Auciello v. Stauffer, 58 N.J. Super. 522, 527-528 (App. Div. 1959). Accordingly, in light of HPS's notice's deficiency, it is respectfully submitted that the Court should invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

In construing the MLUL's notice requirement, including the critical statutory requirement of the "nature of the matters to be considered," the Appellate Division has stated that: "[i]t is . . . plain that the purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing, or at the least, look more closely at the plans and other documents on file." Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 237-38 (App. Div. 1996) (citations omitted). Moreover, notice under the MLUL need not be "exhaustive" vis-à-vis the nature of the matters to be considered. Pond Run Watershed Ass'n v. Tp. of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335, 355 (App. Div. 2008).

The Appellate Division examined the MLUL's notice requirement at length in Pond Run Watershed Ass'n v. Township of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335 (App. Div. 2008). In Pond Run, objectors challenged approvals issued by the Hamilton Township Zoning Board which permitted a mixed-use project "consisting of four buildings with

a total of 119 age-restricted apartments, two retail/office buildings, and another building with a 168-seat restaurant." Id. at 339. The objectors alleged, inter alia, that the applicant's notice failed to adequately describe the nature of the application. The relevant portion of the notice explained:

> The location of the premises in question is located in the RD zoning district, Map 213, section 2713, lots 18-21, and more commonly known as Yardville-Hamilton Square Road. The applicant is seeking a use variance for two non-permitted uses in this zone – age-restricted rental units and retail/office units, for two separate uses on one property, together with bulk variances for front and side yard setbacks, total of two sides and rear yard setbacks, sign setback; variance for separation distance between buildings, variance for buffer distances, approval for preliminary site plan for the purpose of constructing a mixed-use development; approval for final site plan for Phase I; and such other relief as the Board deems necessary.

Id. at 346-347.

In reversing the trial court's decision and vacating the approvals, the Appellate Division agreed with the objectors' contention in that case that the applicant's notice was deficient because it failed to specifically explain that among the proposed retail/office uses was a sit-down restaurant with a liquor license, to wit:

> [The] notice was deficient in failing to indicate whatsoever that the proposed development included plans for a large sit-down restaurant, one that was expected to seek a liquor license to serve alcohol to its patrons. The notice merely refers to "retail/office" uses. That generic reference would not reasonably put a neighbor, or an interested resident, on notice that a substantial restaurant was contemplated for the site….

Id. at 352-353.

Plaintiffs indicate that the notice deficiency which they believe exists in this case is directly analogous to the notice deficiency identified by Appellate Division in Pond Run that resulted in the invalidation of the development approvals in that case. By way of explanation, the notice published and served by HPS prior to the hearing conducted by the Board on its application summarily explained that HPS sought approval for a "solar production system". (P-7). Plaintiffs complain that other than this generic description, however, the notice provided no information whatsoever about the nature of the development actually proposed. Plaintiffs offer, for example, the notice failed to explain that the development involved the construction of thousands of individual photovoltaic arrays as well as internal roads, fences, inverters, stormwater basins and other associated equipment. The notice also omitted mention of the fact that the HPS sought approval to construct a second principal use, to wit, an electrical substation. Finally, Plaintiffs aver that the notice provided no information in regard to the "massive scale" of the proposed development. Plaintiffs criticize that a layperson would simply have no

understanding from reading the notice that the term "solar production system" contemplated a utility-scale solar energy facility spanning approximately 600 acres. Plaintiffs argue that the inadequacy of HPS's notice's description in this regard rivals or exceeds the inadequacy of the notice examined and criticized by the Appellate Division in Pond Run.

In the Court's view, Plaintiffs' characterization of the information set forth in the HPS Notice as "generic" is misleading, and their argument that the HPS Notice is deficient is based on a strained interpretation of the MLUL's notice requirement. To the contrary, the HPS Notice contained the following detailed information explaining the proposed solar production system Project that HPS applied for permission to construct:

> PLEASE TAKE NOTICE . . . [of] Harmony Plains Solar I, LLC's ("Harmony Plains Solar's") application for development of a solar production system.
>
> The blocks and lots upon which the solar production system is proposed are designated on the official Tax Assessment Maps of the Township of Harmony as Block 37, Lot 4, Block 38, Lots 2, 2.05 and 2.06, and Block 44, Lots 9, 10, 14 and 23. A utility easement is also required across Block 37, Lot 17.01 in connection with the proposed development of the surrounding lots. The project is located primarily within the AR-250 (Agricultural/Residential) Zoning District. Block 37, Lot 4 is located within the AR-250 Zoning District and the HD/AH (High Density Affordable Housing) overlay zone. Block 44, Lot 9 is entirely within the LI-O (Light Industrial/Office) Zoning District and Block 44, Lot 23 is partly within the LI-O Zoning District and partly within the I (Industrial) Zoning District. Solar production systems are permitted as a conditional use in the AR-250, LI-O and I zones.
>
> Harmony Plains Solar hereby applies to the Land Use Board for Preliminary and Final Site Plan approval pursuant to N.J.S.A. 40:55D-46 and N.J.S.A. 40:55D-50, as well as major subdivision approval pursuant to N.J.S.A. 40:55D-48 and N.J.S.A. 40:55D-50.
>
> In addition, Harmony Plains Solar seeks the following bulk variances in connection with the proposed major subdivision:
>
> (1) Block 38, Lot 2 (Proposed Lot 2.01) to permit a minimum lot area of 2.95 acres where a minimum of 3 acres is required; and
>
> (2) Block 38, Lot 2 (Proposed Lot 2.01) to permit a maximum lot coverage of 25.16% where a maximum lot coverage of 10% is permitted;
>
> Harmony Plains Solar also seeks to continue the following pre-existing nonconformity on Block 38, Lot 2 (for Proposed Lot 2.01) or, in the alternative, seeks a bulk variance in support of the major subdivision, to the extent relief for such continuation is required, to permit a front yard setback of 59 feet where 75 feet is required.

Plaintiffs rely exclusively on erroneous or inappropriate interpretations of Perlmart and Pond Run. In support of its position, Plaintiffs contend that in Perlmart, the Court found a notice

deficient that stated only that it was "for the creation of commercial lots," but did not apprise the public of the nature of the proposed use for the lots (a K-Mart shopping center) and did not inform the public that conditional use approval was also being pursued. Perlmart, 295 N.J. Super. at 237, 241. Plaintiffs also proffer that in Pond Run, the Court prevented the construction of a restaurant as part of a proposed mixed-use development, where the developer's notice stated only that it was seeking certain variances for "age-restricted rental units and retail/office units," but did not advise the public that the development would also include a nonpermitted use, *i.e.*, a free-standing, 5,000 square foot, 168–seat restaurant. 397 N.J. Super. at 346, 354–55.

However, the Court finds that unlike the public notices in Perlmart and Pond Run, the HPS Notice specifically informed the public of precisely what it intended to construct, *i.e.*, a "solar production system,", as such use is expressly termed and specifically defined under the Zoning Ordinance, and that this use was permitted as a conditional use under the applicable zoning in the Township. The scale of the HPS solar production system was also clearly evident from a reading of the HPS Notice, which detailed that the Project impacted a total of ***nine specifically identified lots*** spanning over ***three zoning districts*** (in addition to the High-Density Affordable Housing overlay zone) in the Township of Harmony. Although certain components that are known to be integral to a solar production system *e.g.*, solar panels, an electrical substation, inverters and other equipment) were not included in the HPS Notice, the MLUL and Pond Run (cited by Plaintiffs) instruct that this type of "exhaustive" detail need not be disclosed.[18]

In fact, the contents of the HPS Notice are more analogous to the content of the public notice that was the subject matter in Gibson v. Tp. of Monroe Plan. Bd., No. A-3847-08T1, 2010 WL 1929590 (N.J. Super. Ct. App. Div. May 14, 2010). There, a developer sought approval to construct a 200,000 square foot Wal-Mart "supercenter." The public notice

[18] In Pond Run, the Appellate Division rejected claims raised by plaintiffs that certain information should have been disclosed in the published notice at issue. In rejecting those claims, the Court characterized the information that plaintiffs alleged should have been disclosed as "generally involv[ing] various subjective topics, such as the quality of the stormwater management plan, or other topics that do not involve a description of what the property would actually be used for." Pond Run, 397 N.J. Super. at 355. The non-disclosures alleged by Plaintiffs on pages 33 and 34 of their Trial Brief, in the Court's view, fall into the same category of generic information described in Pond Run and are the type of "exhaustive" detail that is not required in a public notice.

concerning the proposed development that was published and sent to residents within 200 feet of the proposed development advised that the developer had applied for permission to construct:

> a large scale retail anchor store of approximately 199,798 square feet which includes an outdoor Garden Center and a "seasonal sales" area. The site will include a separate retail structure consisting of 16,000 square feet of floor area and a bank containing approximately 4,396 sf [sic] of floor area. Vehicle ingress and egress will be provided on both road frontages. The applicant proposes 1,101 parking spaces.

Gibson, 2010 WL 1929590, at *3. In rejecting plaintiffs' claims relating to the "nature of the matters to be considered" requirement, which included claims that the notice failed to inform the public that the proposed store would include a supermarket and would be open twenty-four hours a day, the Court stated:

> Unlike the notices in Perlmart and Pond Run, [the developer's] notice specifically apprised the public of exactly what it intended to build, *i.e.*, a cluster of two retail buildings and a bank. Both of these uses were permitted under the applicable zoning. The magnitude of the project was evident from the square footage of the proposed buildings and the number of proposed parking spaces. While no separate mention of a supermarket was made, a supermarket qualifies as a "retail" operation and it was not to be housed in a separate structure, but contained within the larger of the two proposed buildings. Although the proposed hours of operation for the various components of this shopping center were not included in the notice, this is the type of "exhaustive" detail not required pursuant to statute or under Pond Run.

Gibson, 2010 WL 1929590, at *3; see also Shakoor Supermarkets, Inc. v. Old Bridge Tp. Plan. Bd., 420 N.J. Super. 193, 203 (App. Div. 2011) (notice of a proposed "'main retail store of 150,000 s.f.' adequately informed laypersons that a major 'big box' store was proposed for the site and alerted them to the possible concerns, such as traffic, commonly associated with those stores"); Hartz Mtn. Indus., Inc. v. Plan. Bd. of Vill. of Ridgefield Park, No. A-80-02T3, 2004 WL 4076238, at *8 (N.J. Super. Ct. App. Div. June 2, 2004) (notice was adequate even though "it did not sufficiently alert the public to the extensive roadway infrastructure that was required" because developer "gave the location of the development and a detailed description of the construction it planned to undertake on the property" to alert "even a causal reader" to nature of matter to be considered).

The Court finds that like the notices at issue in Gibson, Shakoor and Hartz, the HPS Notice was not deficient in any way. It specifically informed the public of exactly what HPS intended to build, *i.e.*, a solar production system spanning nine lots over three zoning districts in the Township of Harmony (a specified permitted conditional use) requiring, among other things, preliminary and final site plan approval and major subdivision approval. (P-7). First, the Court

notes that the term "solar production system" is a term that is even used and defined in the Harmony Ordinance §165-45.1. In the Court's opinion, a more detailed explanation of what a solar production system consists of was not necessary under the circumstances. The appropriate standard is not whether it would have been "possible" or "nice" for the notice to contain a more detailed description of the project. The criticism that it would have been "possible" or "nice" for a notice to be more specific is likely applicable to most, if not all, development applications. In the Court's view, the HPS Notice achieved its purpose set forth in Perlmart by "fairly appris[ing]" the public of the nature of the matters to be considered so one could make "an informed determination as to whether they should participate in the hearing, or at the least, look more closely at the plans and other documents on file." Perlmart, 295 N.J. Super. at 237-38.[19]

Further, it suggests that the fact that many residents did attend the hearing to speak on the proposed development that the HPS Notice was adequate to apprise the public of the nature of the Project.

For those reasons, the Court rejects Plaintiffs' claims alleging deficiencies with respect to the HPS Notice and the Court will dismiss Count I of Plaintiffs' Complaint which pertains to that issue.

F. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE HPS FAILED TO COMPLY WITH THE MUNICIPAL LAND USE LAW'S MANDATORY CORPORATE DISCLOSURE REQUIREMENTS?

The MLUL requires all corporations or partnerships seeking to develop a property for commercial purposes to disclose the names and addresses of "all stockholders or individual partners owning at least 10% of its stock of any class or at least 10% of the interest in the partnership, as the case may be." N.J.S.A. 40:55D-48.1. In the event that a corporation or partnership owns 10% or more of the stock of the applicant corporation or partnership, a requirement for additional disclosure exists, to wit:

[19] Not only was the HPS Notice sufficiently specific and detailed but, with the Board's hearing being conducted virtually (as reflected in the Notice), all exhibits to be introduced during the Board's hearing, as well as HPS's Application, its supporting documentation and the review letters of the Board's consultants, were made available for inspection online at least 48 hours in advance of the hearing in accordance with DCA guidance for virtual hearings. Any interested member of the public could have viewed the plans and the entire nature and scope of the solar production system Project online prior to the hearing without having to go to the Municipal Building to view the documents in-person. (P-7).

> [T]hat corporation or partnership shall list the names and addresses of its stockholders holding 10% or more of its stock or of 10% or greater interest in the partnership, as the case may be, and this requirement shall be followed by every corporate stockholder or partner in a partnership, until the names and addresses of the noncorporate stockholders and individual partners, exceeding the 10% ownership criterion established in this act, have been listed.

N.J.S.A. 40:55D-48.2

In fact, the MLUL expressly prohibits a land use board from approving the application of any corporation or partnership that fails to comply with these disclosure requirements. N.J.S.A. 40:55D-48.3. Plaintiffs argue that is, nevertheless, what occurred in the instant case.

By way of explanation, HPS submitted an ownership disclosure statement with its application to the Board. (P-6). This document revealed that HPS is comprised of five entities and individuals having more than a 10% interest including Dakota Renewable Energy, LLC, Dakota Power Partners, LLC, Timothy Daniels, John Schoenberger and MAP RE 2018, LP. However, contrary to N.J.S.A. 40:55D-48.2, HPS failed to provide further disclosure in regard to the individual corporate ownership interests of Dakota Renewable Energy, LLC, Dakota Power Partners, LLC or MAP RE 2018, LP. Notwithstanding this situation, the Board approved HPS's application at the conclusion of the hearing as if complete disclosure had been made.

Accordingly, Plaintiffs submit that in light of HPS's failed mandatory disclosure, Plaintiffs submit that the Court should invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

In response, Harmony Plains notes that it "cautiously" submitted a disclosure statement in its Application, N.J.S.A. 40:55D-48.1 not apply to limited liability companies. According to Harmony Plains, that statutory section applies only to "corporations" and "partnerships," and HPS is neither. The Defendants note that even the Plaintiffs themselves note that a Court should not find legislative language to be "inoperative, superfluous or meaningless" and should not engage in rewriting statutes or inferring intentions beyond their plain language. (Pl. Br. at 36).

It has long been settled that "legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." Board of Ed. of City of Hackensack v. City of Hackensack, 63 N.J. Super. 560, 569 (App. Div. 1960) (citing Abbotts Diaries, Inc. v. Armstrong, 14 N.J. 319 (1954)). Courts may neither "rewrite a plainly written enactment" nor "presume an intention other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002) (citing State v. Afanador, 134 N.J. 162, 171 (1993); State v. Wright, 107 N.J. 488, 495 (1987)). Particularly with the MLUL, the Legislature made clear that

the term "shall" indicates a mandatory requirement. N.J.S.A. 40:55D-3. In fact, the term "shall" appears in both N.J.S.A. 40:55D-48.2, which obligates the individual stockholder disclosure, as well as in N.J.S.A. 40:55D-48.3, which prohibits an approval in the absence of compliance.

In support of their position, the Defendants point out that LLCs in New Jersey have existed since 1994. The Defendants theorize that the legislature wanted to amend N.J.S.A. 40:55D-48.1 to include LLCs, it had almost 30 years to do so. In fact, the Defendants point out that it *has* acted when it wanted to act in analogous contexts. N.J.S.A. 52:25-24.2, which provides for a public disclosure requirement for public bids, like N.J.S.A. 40:55D-48.1, originally pertained only to "corporations" and "partnerships," but was amended in 2016 *to add "limited liability companies*." But the Defendants indicate that N.J.S.A. 40:55D-48.1 was *not* amended even though it could easily have been done. The Defendants offer that the reason that it has not been amended is supported by the complexity of some, perhaps many, Limited Partnership entities. In fact, Harmony Plains' Supplemental Disclosure Statement (HPS-1) (which the Defendants claim is again is not required) contain the many levels of ownership there are in this LLC structure. The Defendants speculate that the legislature apparently did not want to amend the statute – perhaps because LLCs tend to be more likely to entail complicated structures with numerous layers of owners.

Also, Harmony Plains, after the filing of this Prerogative Writ challenge, provided each Land Use Board member a Supplemental Disclosure Statement (HPS-1) disclosing all individual owners of HPS, all entities owning at least 10% of HPS, all entities owning at least 10% of those owner-entities, and so forth, down to the bottom of the family tree of entities without any such 10%-plus owners. The Supplemental Disclosure Statement and the individual Board Member Certifications were created nearly a year after the record on the Harmony Plains application closed on January 6, 2021. Although they maintain that the Supplemental Disclosure was not necessary, each board member has certified that he has no familiarity with any such individual or entity except specifically in connection with HPS' Application and the proceedings before the Board. (HPS-2-7).

In other words, despite submitting a partial disclosure statement with its application, Harmony Plains subsequently submitted a supplemental disclosure statement in an apparent effort to remedy the initial deficiency.

First, the Court notes that the MLUL predates, by nearly 20 years, the legislation which first authorized the formation of limited liability companies in New Jersey. See N.J.S.A.

40:55D-1, et seq.; N.J.S.A. 42:2B-1, et seq. In other words, it is likely that the MLUL's disclosure requirements do not specifically mention limited liability companies because limited liability companies did not exist in 1975. On the other hand, the clear import of the statutory scheme compels the conclusion that the Legislature would have intended the disclosure requirement to apply to limited liability companies. See State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) (citing AMN, Inc. v. Township of S. Brunswick Rent Leveling Bd., 93 N.J. 518, 525 (1983)). An interpretation to the contrary would lead to absurd results. Id. (citing State v. Provenzano, 34 N.J. 318, 32 2(1961)).The Court cannot find that the Legislature ignored the very purpose of the Disclosure Law by allowing a grant, unexplained loophole in the law that would permit one type of entity from the requirement while requiring all others to do so. The more logical explanation is that the reference to "partnerships" in the Disclosure Law also encompasses "Limited Partnerships" thereby resulting in a situation where the statute need not be amended.

With regards to the Supplemental Disclosure Statement, in the Court's view, the deficiencies in HSP's disclosure statement cannot be rectified by simply providing a series of supplemental certifications to the Court. It has long been settled that the record made before the Board "is the record upon the basis of which the correctness of the action of the board is to be determined." Kempner v. Edison Tp., 54 N.J. Super. 408, 417 (App. Div. 1959) (citing Dolan v. DeCapua, 16 N.J. 599 (1954); Beirn v. Morris, 14 N.J. 529 (1954)). As a rule, matters outside the record may not be considered on appeal. Id. In that regard, any attempted supplementation of the record necessitates a remand to the Board. In the Court's view, the drastic remedy called for by the Plaintiffs, that is to void the entire process and resolution, is draconian, unnecessary and unjust. The solutions posed in other cases where the Appellate Division has addressed this issue is more reasonable, equitable and just. See Arroyo v. Brick Recycling Co., Inc., Dkt. No. A-3966-12T2, 2014 WL 813919, at *4 (N.J. Super. Ct., App. Div. Mar. 4, 2014) (alleged defect in corporate disclosure statement may be corrected on remand to the Board and document can be filed *nunc pro tunc*); Price v. Hudson Heights Dev., LLC, 2008 WL 5119157, at *1, 3 (N.J. Super. Ct., App, Div. Dec. 8, 2008) (trial court found that failure to file the disclosure statement was an "oversight" that was cured when applicant later filed the statement; trial court's decision upholding the zoning board's decision was overturned on other grounds, but the Appellate Division noted that the disclosure statement "had been filed and accepted by the Board" and suggested no error on that aspect of the trial court's decision). Even though those opinions are

unpublished and therefore not binding on the Court, the Court does find that the rationale for the Court's findings in those matters to be compelling.

For these reasons, the Court finds that a limited remand on that issue is warranted and appropriate. On remand , the record can be opened so that the Supplemental Disclosure can be admitted; the Board Members can make statements that may even mirror the statements made in their Certifications; and the matter can be opened to the public for comment. The Board can then vote on the record as supplemented so that a full public record can then be available if the Plaintiffs choose to appeal the issue again. In that event, the Court retains jurisdiction so that any limited appeal of that issue can be efficiently addressed by the Court without the need for filing an entirely new Prerogative Writ Action.

G. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE THE RESOLUTION FAILS TO SET FORTH ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW?

The MLUL requires a land use board to adopt a written resolution following its decision on an application for development. N.J.S.A. 40:55D-10.g.

N.J.S.A. 40:55D-10(g) provides:

> [t]he municipal agency [in its resolution] shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing. The municipal agency shall provide the findings and conclusions through: (1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development. . . .

Thus, the statute requires a municipal agency to reduce each decision on any application for development in the form of a resolution that includes findings of fact and conclusions of law. SMSA v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 333 (App. Div. 2004); accord Harmony Code § 110-33 ("Each decision on any application for development shall be set forth in writing as a resolution of the Board, which shall include findings of fact and legal conclusions based thereon."). The resolution must contain sufficient findings based on the proofs submitted to satisfy the court that the board properly analyzed the application in accordance with the MLUL's requirements and the Township's zoning ordinance. Medici v. BPR Co., 107 N.J. 1, 23 (1987).

As a rule, the resolution must include the board's findings of fact and conclusions based thereon. Id. It must indicate what facts have been accepted as true based on the testimony elicited. Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div. 1988), cert. den., 118 N.J. 216

(1989). Moreover, "[t]he board must explain how its findings support its ultimate legal conclusions." Morris County Fair Housing Council v. Boonton Tp., 228 N.J. Super. 635, 647 (Law Div. 1988).

To avoid invalidation, the resolution must "adequately embody the necessary administrative findings." Smith v. Fair Haven Zoning Bd. of Adj., 335 N.J. Super. 111, 123 (App. Div. 2000); see, also, Saadala v. East Brunswick Zoning Bd. of Adj., 412 N.J. Super. 541 (App. Div. 2010) (reversing use variance approval where board's resolution made only conclusory statements lacking evidential support regarding particular suitability). In this same vein, a resolution which simply parrots the statutory language is deficient. See Parisi v. North Bergan Mun. Port Auth, 206 N.J. Super. 499, 504 (App. Div. 1985), aff'd in part, rev'd in part, 105 N.J. 25 (1987).

In this case, the Board approved HPS's application on January 6, 2021 and subsequently adopted the Resolution on March 3, 2021. (P-11). In this action, Plaintiffs contend that the Resolution includes various recitals describing HPS's application and the testimony elicited but Plaintiffs state that it fails to indicate the Board's actual findings of fact. According to the Plaintiffs, the Resolution similarly fails to incorporate any analysis in regard to the Board's conclusions of law. Plaintiffs offer, by way of example but not limitation, the Resolution fails to incorporate any assessment in regard to the variances requested by HPS as against the applicable statutory criteria. In that way, Plaintiffs contend that the Resolution is tantamount to a "net opinion." Notwithstanding that situation, Plaintiffs complain that the Board adopted the Resolution as if no infirmities existed. Plaintiffs therefore submit that the Board's actions in that regard were arbitrary, capricious, unreasonable and contrary to law. As a result, Plaintiffs submit that the Court should invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

Here, notwithstanding Plaintiffs' position, the Court finds the Resolution clearly demonstrates that the Board considered the record before it during the several-hour hearing in providing a sufficiently detailed summary of its factual findings and legal conclusions. The Resolution contains over eight pages of detailed findings and conclusions, including a detailed description of the Property, the Project and Application; the testimony of the land use board engineer, HPS's representative, and HPS' engineer and planner; the exhibits introduced into evidence; public comments; each proof considered; the applicable ordinances reviewed as to each activity requiring interpretation; the zoning interpretations made by the board in connection

with its determination that the proposed use satisfied the Township's conditional use standards and that, accordingly, a use variance was not required; the Sica standard; and its conclusions of law with regard to HPS' satisfaction of the proofs required for the variance relief requested in connection with the application.

Plaintiffs' argument appears to be that all of what were clearly findings and testimony adopted appeared in the recitals section instead of the "wherefore" section. Such a proposition is, in the Court's view, a form over substance argument -- not at all different from where, for example, the Appellate Division recites everything the trial court said in the opinion and adopts the reasoning. In the Court's view, there was no mystery as to the Board's intention to adopt the testimony of the various witnesses, particularly given the references to the applicable legal standards that Plaintiffs incorrectly claim were missing from the Resolution.

The Court finds that the Board's actions were consistent with its legal obligations under both the MLUL and the Zoning Code. In the Court's view, the Resolution clearly makes appropriate findings with respect to the Board's interpretations of its ordinance and with regard to the uses contemplated and variance relief requested. In the Resolution, the Board then applied the recited facts to the applicable legal standards, including the conditional use criteria contained in the Ordinance. See Sica v. Board of Adjustment of Wall, 127 N.J. 152 (1992). In fact, the Board was abundantly clear in articulating its reasoning for its approval of the Application. Thus, the substantive record created before the Board and a fair reading of the Code sections at issue demonstrate that the Board fulfilled its obligations to memorialize a resolution that fully represented the Board's findings and on which it based its determination.

For these reasons, the Court finds that notwithstanding the Plaintiffs' arguments, the Board's Resolution sets forth adequate findings of fact and conclusions of law. Notwithstanding the Court's findings, since this matter will be remanded to the Board for a limited purpose described in Paragraph "F" above, the Court will also permit the Board to clarify its position on its factual findings when it addresses the limited matter that is the subject of the remand.

H. SHOULD THE COURT INVALIDATE AND SET SIDE THE RESOLUTION AND ALL APPROVALS GRANTED THEREIN BECAUSE INELIGIBLE BOARD MEMBERS VOTED ON THE APPLICATION?

For a board member to be eligible to vote on a particular development application, he or she must be present at all meetings during which the board conducted its hearing on the matter. An absent board member may become eligible to vote but only by first reading the transcript or listening to the recording from the meeting that he or she missed and subsequently executing a

confirming certification. This procedure is set forth in N.J.S.A. 40:55D-10.2, which provides, in relevant part:

> A member of a municipal agency who was absent for one or more of the meetings at which a hearing was held shall be eligible to vote on the matter upon which the hearing was conducted, notwithstanding his absence from one or more of the meetings; provided, however, that such board member has available to him the transcript or recording of all of the hearing from which he was absent, and certifies in writing to the board that he has read such transcript or listened to such recording.

Id.

The Appellate Division has explained that the Legislature's intent with N.J.S.A. 40:55D-10.2 is to ensure that all those voting on a land development application "are fully informed of what transpired during all the hearings on that application." Schmidhausler v. Planning Board of Borough of Lake Como, 408 N.J. Super. 1, 13 (App. Div. 2009). When a board member is absent and has voted on an application without first reading the transcript or listening to the recording from the meeting(s) from which he or she was absent, the remedy is to remand the application to the board for all members to deliberate and revote after the ineligible board member takes the necessary steps to become eligible. Id. However, if the ineligible member who voted also had a conflict of interest, a remand is not possible. Rather, the entire proceeding must be invalidated and the Board's action set aside. Id. at 13.

Plaintiffs contend indicate that in this case, the Board conducted a virtual hearing on HPS's application on January 6, 2021 via the Zoom videoconferencing platform. (P-8). A total of seven Board members participated and eventually voted on HPS's application including Peter Ward, Mayor Brian Tipton, Committeeman Richard Cornely, Jamie Sampson, Don Troxell, John Franceschino and Glenn Fohr. Most Board members remained visible the entire time. According to the Plaintiffs, this was not the case with all Board members, however. In fact, Plaintiffs allege that Mayor Tipton "disappeared without explanation" on numerous occasions throughout the course of the hearing. Plaintiffs indicate that a review of the Zoom video submitted herewith as P-7 confirms his absence during the following times:

- 00:32:46 – 00:41:38
- 00:47:13 – 00:52:38
- 00:59:22 – 02:05:13
- 02:44:48 – 02:47:09
- 02:47:27 – 02:49:30
- 02:55:24 – 02:57:49

- 03:04:41 – 03:05:47
- 03:09:17 – 03:10:01
- 03:10:49 – 03:25:09
- 03:27:58 – 03:30:37
- 03:31:46 – 03:33:51
- 03:34:37 – 03:35:23
- 03:35:40 – 03:36:46
- 03:37:17 – 03:39:00
- 04:57:27 – 05:00:18

In total, Plaintiffs state that Mayor Tipton voluntarily removed himself from public view for approximately two (2) hours of the hearing. Plaintiffs assert that this does not even include the other times when he remained visible but was clearly engaged in other activities such as physical exercise. See, e.g., 02:49:53 – 02:50:45. Plaintiffs therefore argue that Mayor Tipton's "participation" in this matter fell below the bar established by the Legislature for voting Board members to be "fully informed of what transpired". N.J.S.A. 40:55D-10.2. Plaintiffs therefore submit that only one remedy exists, and that is for the Court to invalidate and set aside the Resolution and all approvals memorialized therein, as a matter of law.

However, the Court finds that the disabling of the Mayor's camera - if this was even the case - is not grounds for overturning an act of the Planning Board. It is of no consequence because Plaintiffs have not shown that the Mayor was absent at any point during the hearing. In fact, the record before the Court indicates the opposite.

The only case Plaintiffs cite purportedly in support of their argument states that those voting on a land development application must be fully informed of what transpired during all the hearings on that application – an obvious point. They cite no case in which the Court required a board member to keep his camera on the entire time. First, the Court finds that Plaintiffs' Count VII fails for that reason alone.

Moreover, the New Jersey State Legislature enacted, and the governor signed, "An Act concerning appeals of electronic meetings held under the 'Municipal Land Use Law' during the emergency declared in response to the COVID-19 pandemic" (the "Act"). The Act applies retroactively from March 9, 2020 (before the January 6, 2021 meeting in question) and provides:

> a decision of a municipal agency made at, or based, in whole or in part, on a meeting or proceeding held by means of communication or other electronic equipment such that some or all participants are not in the same physical location shall not be appealable on grounds attributable to convening the meeting or proceeding by means of

> communication or other electronic equipment, including but not limited to, lack of a physical quorum, lack of proper notice, conduct of the meeting or proceeding, or lack of a reasonable opportunity to be heard or otherwise participate in the meeting or proceeding, provided that notice of the meeting or proceeding, and the conduct of the meeting or proceeding, is consistent with this section, and with guidance documents issued by, or rules or regulation promulgated by, the Department of Community Affairs and published on the department's Internet website on the date such notice was given.
>
> This act shall take effect immediately and shall be applicable to a meeting or proceeding conducted by a municipal agency on or after March 9, 2020 and during a period declared, in response to the COVID-19 pandemic, pursuant to the laws of this State as a state of emergency, public health emergency, or both, or for a reasonable period of time following cessation of a declared emergency, if so provided by executive order.

See HPS-12 (emphasis added).

The Court also finds that the terms of the Act warrants dismissal of Count VII as a matter of law. It broadly allows meetings to be held by unlimited means of communication by which not all participants are in the same physical location. Under the Act, some or all of the board members could have called in by telephone and watched the Zoom meeting without appearing on video. The Act was to deal with a pandemic – a public emergency – posing unprecedented problems with the need to utilize unprecedented measures.

Moreover, the State Legislature could easily have taken the opportunity to insert language in the Act that limits the means of "communication" to video meetings and requires that all board members turn on video cameras at all times during the meeting. But it did not, and the Court cannot and should not infer such a requirement. In fact, such an interpretation does not make sense. For instance, what if a board member had a poor internet connection and simply wished to dial in? That should be permitted and that is exactly what the Act does permit.

The Mayor's disabling of his camera – even if that is what occurred – therefore fits squarely into the scenarios spelled out in the Act. Further, as set forth in the Township's answers to Plaintiffs' interrogatories (P-3) and the accompanying certifications, none of the participants who voted on the approval ever disconnected from the meeting. Even though the Court allowed limited discovery on the subject, Plaintiffs ignored certified information and made their arguments anyway. There are no facts before the Court that would suggest that Mayor Tipton was not present for the entire hearing.

Further, if the Act itself is somehow not clear enough, the DCA's Emergency Remote Meeting Protocol for Local Public Bodies, N.J.A.C. 5:39-1.1 to 5:39-1.7, removes any doubt that Count VI is baseless. N.J.A.C. 5:39-1.4(d) addresses meetings where, as here, sworn testimony was taken and provides, "Any remote public meeting where sworn testimony is being

taken shall be broadcast by video as well as by audio. All individuals giving sworn testimony at a remote public meeting shall appear by video in addition to audio." (emphasis added). It makes perfect sense that someone providing sworn testimony should be visible (if for no other reason than the public's ability to confirm the persons testifying are who they say they are). Again, the DCA had the opportunity in this exact provision to impose such a requirement on board members but did not do so. Neither this provision nor any other provision in this detailed set of regulations requires that board members be on camera at all times.

For these reasons, the Court finds that Plaintiffs' arguments on this issue are without merit. As such, the Court will dismiss Count VII with prejudice.

CONCLUSION

For the reasons expressed in the Court's opinion, the Court affirms many of the Board's actions, but the Court remands the matter to the Board for the limited basis that are described in the Court's opinion.

Dated: March 9, 2022